McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys

December 18, 2001

Congressional Research Service
https://crsreports.congress.gov
RL30060

Summary

The McDade-Murtha Amendment, 28 U.S.C. 530B, requires federal prosecutors to follow state and federal rules of professional responsibility in effect in the states where they conduct their activities. It also continues in place the sixty year old directive that federal prosecutors follow the ethics rules promulgated by the states in which they are licensed to practice. Proponents claim the change will confirm that federal prosecutors must follow the same ethical rules as other lawyers and will enhance the prospect of some protection against wayward federal prosecutors. Opponents charge that it will implicitly undermine the Attorney General's authority to preempt state laws that conflict with federal law enforcement interests and that in doing so it will jeopardize the use of undercover techniques against terrorists, drug kingpins and child predators because of possible interpretations of the so-called no contact rule.

Under the no contact rule, accepted in virtually every American jurisdiction, a lawyer in representing a client may "not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The rule was designed to prevent lawyers from taking unfair advantage of their untutored opponents.

The Justice Department is troubled by judicial interpretations of the rule that indicate that it may apply: (1) in criminal cases prior to arrest or indictment; (2) to federal prosecutors whose only contact is through informants, cooperative witnesses, undercover agents, or federal investigators; (3) even though the represented client initiated the contact; or (4) to contacts with the employees or agents of an organizational target of a federal administrative and civil investigation. The courts have thus far repudiated the efforts of the Department to craft an exception for federal prosecutors administratively.

Similar concerns stimulated by rules covering the disclosure of exculpatory evidence to the grand jury and the use of grand jury subpoenas against attorneys seem to have been eased by internal guidelines and more favorable jurisprudence.

At its heart, the debate involves defining the ethical bounds within which Department of Justice attorneys must operate and deciding to whom that task should be assigned.

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Introduction

The McDade-Murtha Amendment, 28 U.S.C. 530B, requires federal prosecutors to follow state and local federal court rules of professional responsibility in effect in the states where they conduct their activities. Proponents claim the change confirms that federal prosecutors must follow the same ethical rules as other lawyers and enhances the prospect of some protection against wayward federal prosecutors. Opponents charge that it implicitly undermines the Attorney General's authority to preempt state laws which conflict with federal law enforcement interests and that in doing so it jeopardizes the use of undercover techniques against terrorists, drug kingpins and child predators.

Summary of the Amendment

The Amendment[1] declares that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State," 28 U.S.C. 530B(a).

The phrase "attorneys for the government" is defined to include only Justice Department attorneys and those exercising federal litigation authority, including federal independent counsel.[2] The Attorney General is empowered to promulgate the regulations necessary to implement the statute's instructions, 28 U.S.C. 530B(b).

[1] The proposition was originally proposed by Congressmen McDade and Murtha as part of the Citizens Protection Act, H.R. 3396 (106th Cong.).

[2] 28 U.S.C. 530B(c)("(c) As used in this section, the term `attorney for the Government' includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40"). 28 C.F.R. §77.2 provides, "As used in this part, the following terms shall have the following meanings, unless the context indicates otherwise: (a) the phrase *attorney for the government* means the Attorney General, the Deputy Attorney General, the Solicitor General, the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, and Tax Division; the Chief Counsel of the DEA and any attorney employed in that office; the General Counsel of the FBI and any attorney employed in that office or in the (Office of General Counsel) of the FBI; any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515; any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; and any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States. The phrase *attorney for the government* also includes any independent counsel, or employee of such counsel, appointed under chapter 40 of title 28, United States Code. The phrase *attorney for the government* does not include attorneys employed as investigators or other law enforcement agents by the Department of Justice who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings. . . . "(c) The phrase *civil law enforcement investigation* means any investigation of possible civil violations of, or claims under, federal law that may form the basis for a civil law enforcement proceeding.

"(d) The phrase *civil law enforcement proceeding* means a civil action or proceeding before any court or other tribunal brought by the Department of Justice under the authority of the United States to enforce federal laws or regulations, and includes proceedings related to the enforcement of an administrative subpoena or summons or civil investigative demand."

The appropriations law which enacted the Amendment elsewhere reminded the Department of Justice of the command first issued in 1938 to the effect that its attorneys must comply with the ethical standards of the state bars to which they are admitted.[3]

Legislative Background

Congress included the Amendment as section 801 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 112 Stat. 2681-118 (1998). Section 801 was a remnant of the Citizens' Protection Act whose roots extend back at least to the 101st Congress when the House Government Operations Committee conducted hearings[4] and recommended among other things a thorough examination of the ethics rules applicable to Department attorney while expressing concern over "the problems inherent in any system of self-policing and regulation," H.Rept. 101-986, at 35 (1990).

The issue lay dormant until the 104th Congress, when Representative McDade introduced a bill, using essentially the same language found in section 801.[5] The House Judiciary Courts and Intellectual Property Subcommittee held hearings,[6] but Congress took no other action.[7]

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[3] Sec. 102, P.L.No. 105-277, 112 Stat.2681-66 (1998): "Authorities contained in the Department of Justice Appropriation Authorization Act, Fiscal Year 1980 (Public Law 96-132; 93 Stat. 1040 (1979)), as amended, shall remain in effect until the termination date of this Act or until the effective date of a Department of Justice Appropriation Authorization Act, whichever is earlier." The 1979 limitation has been carried forward in annual Justice Department appropriations ever since, *e.g.*, P.L.No. 106-113, 113 Stat. 1501A-19 (1999); P.L.No. 106-553, 114 Stat. 2762A-67 (2000). Section 3(a) of the 1979 legislation declares that, "None of the sums authorized to be appropriated by this Act may be used to pay the compensation of any person employed after the date of the enactment of this Act as an attorney (except foreign counsel employed in special cases) unless such person shall be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia," 93 Stat. 1044 (1979).
Virtually identical language had appeared in every Justice Department appropriation act prior to 1979 all the way back to 1938, 52 Stat. 269 (1938). Since an attorney can only be "duly licensed and authorized to practice" if he or she agrees to adhere to the ethical standards required of members of the bar, the courts have understood this requirement to mean that Justice Department attorneys must follow the ethical standards prescribed by the states in which they were admitted to practice, *United States v. Ferrara*, 847 F.Supp. 964, 969 (D.D.C. 1993), *aff'd on other grounds*, 54 F.3d 825 (D.C.Cir. 1995).

[4] *Exercise of Federal Prosecutorial Authority in a Changing Legal Environment: Hearing Before the Government Information, Justice, and Agriculture Subcomm. of the House Comm. on Government Operations*, 101st Cong., 2d Sess. (1990).

[5] H.R. 3386 (104th Cong.): Sec. 1."This Act may be cited as the `Ethical Standards for Federal Prosecutors Act of 1996.' Sec. 2. ETHICAL STANDARDS FOR FEDERAL PROSECUTORS. (a) IN GENERAL- Chapter 31 of title 18, United States Code, is amended by adding at the end the following: `Sec. 530B. Ethical standards for attorneys for the Government. `(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.
`(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section. `(c) As used in this section, the term `attorney for the Government' includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations.'"

[6] *Ethical Standards for Federal Prosecutors Act of 1996: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996).

[7] Early in the 104th Congress, Senator Dole introduced a comprehensive crime control bill that included a provision authorizing the Attorney General to shield Justice Department attorneys from the otherwise applicable ethical standards under state bar rules and local federal court rules, S.3, §502 ("Notwithstanding the ethical rules or the rules of the court of any State, Federal rules of conduct adopted by the Attorney General shall govern the conduct of prosecutions in the courts of the United States"). While the Senate Judiciary Committee held hearings on various aspects of S.3, none

Congressman McDade reintroduced the measure early in the 105th Congress (H.R. 232). He and Congressman Murtha subsequently offered a second bill, the Citizens Protection Act (H.R. 3396), which added sections on punishable conduct and on a Misconduct Review Board to ensure enforcement of basic ethical standards. There were no committee hearings held, nor reports issued, on either bill, but the House Appropriations Committee incorporated the Citizens Protection Act into its omnibus appropriations measure (H.R. 4276). The Committee's report tersely explained that the portion of the bill which was eventually enacted was designed to confirm that the Attorney General did not have the authority to exempt Department attorneys from the ethical standards to which other attorneys were held.[8] The Senate version of the measure had no similar provision.

The conference committee for the appropriations package stripped out the punishable conduct and review board sections leaving section 801 to be passed with the rest of the compromise bill. Senators Hatch and Leahy, the Chairman and ranking minority member the Senate Judiciary Committee, greeted section 801's passage with dismay.[9]

During the 106th Congress, Senate Hatch introduced legislation repealing the Amendment and codifying the requirement that federal prosecutors adhere the ethical standards of the bar to which they were admitted, S.250.[10] The Subcommittee on Criminal Justice Oversight of the House Committee on the Judiciary held hearings, but no further action was taken.[11]

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appear to have focused on the ethical standards issue, *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995); *Federal Law Enforcement Priorities: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995); *The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995); S.3 was never reported out of committee.

[8] "The bill includes language to make government attorneys subject to laws and rules of the State and the rules of the local Federal court in which they are practicing and to establish conduct standards and procedures for Department of Justice employees. Subtitle A, section 811, addresses the concerns of the Committee about the Department of Justice's issuance of a regulation that exempts its attorneys from the same State laws and rules of ethics which all other attorneys must follow (59 Fed.Reg. 39910, August 4, 1994)," H.R.Rep.No. 105-636 at 154 (1998). As discussed below, the Department of Justice had reacted to judicial construction of the so-called "no contact" rule of professional ethics first with a memorandum from Attorney General Thornburgh and then with regulations from Attorney General Reno that purported to authorize federal prosecutors to disregard the rule except to the extent noted in the memorandum/regulations.

[9] 144 *Cong.Rec.* S12798-799 (daily ed. Oct. 21, 1998)(remarks of Sen. Hatch)("This ill-advised provision passed the House as an amendment to the House Commerce, State, Justice Appropriations bill but it never passed the Senate. . . . I would note, however, that in response to our concerns, the Leadership has inserted a provision which will delay the implementation of this provision for six months. At the very least, this will give the Department of Justice and others the opportunity to educate the Congress as to the serious effect this blanket provision will have on law enforcement. It is my hope and expectation that, during the next sixth months, we will be able to develop a more workable and effective solution"); 114 *Cong.Rec.* S12858-858 (daily ed. Oct. 21, 1998)(remarks of Sen. Leahy)("mischief"); *see also*, 144 *Cong.Rec.* S12996-997 (daily ed. Nov. 12, 1998)(remarks of Sen. Abraham).

[10] Senator Hatch also introduced S. 755 which would have delayed the April, 1999 effective date of the Amendment for another six months.

[11] *The Effect of State Ethics Rules on Federal Law Enforcement: Hearing Before the Subcomm. Of the Sen. Comm. On the Judiciary*, 106th Cong., 1st Sess. (1999). Legislative activity in this Congress is the subject of separate report entitled *McDade-Murtha Amendment: Legislation in the 107th Congress Concerning Ethical Standards for Department of Justice Litigators*, CRS REP. NO. RL (Dec. 18, 2001).

Apparent Points of Disagreement

While no single source in the legislative background supplies a full explanation or even a full identification of the issues reflected in the McDade-Murtha Amendment, the legislative record taken as a whole reveals the positions of proponents and opponents. Proponents maintain:

- there are instances of federal prosecutorial abuse
- traditional checks on federal prosecutorial abuse have eroded; the courts have been increasingly reluctant to use their supervisory powers to prevent or correct prosecutorial abuse; the check once afforded by scarce resources no longer applies; the incentives for abuse have become more attractive
- the judicial remedies available for prosecutorial abuse (retrial) are costly and do little to discourage or punish overzealous prosecutors
- the Department of Justice's system of self discipline has not been effective
- the disciplinary mechanisms available for enforcement of standards of conduct for the legal profession offer an impartial means of deterring and punishing prosecutorial abuse
- the disciplinary mechanisms are more effective if they can be invoked where the abuse occurs rather than where the prosecutor is admitted to practice
- the Attorney General lacks authority claimed by the Justice Department to waive the ethical standards to which federal prosecutors must otherwise adhere
- the enforcement of standards of professional conduct poses no threat to effective federal law enforcement; should such a threat develop the appropriate response is federal legislation

Critics contend:

- there are few instances of federal prosecutorial abuse
- charges of prosecutorial abuse are the work defense lawyers attempting to encumber effective law enforcement
- the Justice Department has an effective internal means of dealing with any wayward federal prosecutors
- federal prosecutors have and will continue to observe the highest standards of professional conduct, but under the guise of ethical standards states have introduced policy determinations (in conflict with existing federal policies) into the rules, i.e.:

  - "no contact" rules that hamstring undercover and other legitimate investigative techniques

  - requiring the disclosure of exculpatory evidence to the grand jury

  - requiring prior judicial approval before serving a subpoena on an attorney to appear before the grand jury and testify about client-related matters

- the Attorney General has preemptive authority to determine the manner in which federal laws are enforced
- state authorities have no power to preempt conflicting law enforcement policies and standards of conduct founded on federal law

- federal law enforcement policies should be determined by federal authorities not state bar authorities (who are often captives of the defense bar)
- state authorities have no power to pre-empt conflicting federal law enforcement policies and standards of conduct founded on federal law
- requiring federal law enforcement authorities to comply with the multitude of state bar requirements would impair federal multistate investigations

Federal Prosecutorial Abuse

During floor debate on the Amendment to strike the Citizens Protection Act from the appropriations package, several Members of the House spoke from personal experience of both specific instances[12] and of general patterns of prosecutorial misconduct.[13] Their disclosures often ended with exasperated observations about the ineffectiveness of existing preventive and remedial measures.[14] They were met by proponents of the amendment who cautioned against

[12] *E.g.*, 144 *Cong. Rec.* H7229 (daily ed. Aug. 5, 1998) (remarks of Rep. Murtha) ("insidious" and "unethical tactics" used against Rep. McDade); *id.* at H7230 (remarks of Rep. Ford) ("5 years of investigating, several years, one trial, a second trial, abuse by the Justice Department, simply trampling the rights of an individual, another Member of Congress, I cannot tell you the pain that it exacted on my family and my father personally"); *id.* at H7233 (remarks of Rep. King) ("I would like to refer to a predecessor that I had here in the Congress. . . . He was a man who was brought in by the United States Attorney and told he had to deliver a political leader. When he refused to do that, he was called before the grand jury. His family was harassed. He was indicted. His friends were indicted. Everything was leaked to the newspapers. This man's career was destroyed. He was defeated here in the United States Congress. Finally his case went to trial. The jury was out 30 minutes and he was acquitted. It came out . . . that all throughout the trial, from day one, the prosecutors had evidence that would have completely exonerated this defendant . . . the judge said it was disgrace"); *id.* at H7245 (remarks of Rep. Duncan) ("We have had far too many cases where overzealous prosecutors have presented high profile defendants just so that prosecutor could make a name for himself. I remember the totally unjustified case against President Reagan's Secretary of Labor, Ray Donovan, in which after he was acquitted, made the famous statement, "Where do I go to get my reputation back?").

[13] *E.g.*, 144 *Cong. Rec.* H7232 (daily ed. Aug. 5, 1998)(remarks of Rep. Kanjorski)("the prosecutors in the United States today, whether they be special counsels or regular prosecutors, have shown us that they are going to push it to the end of the envelop and beyond. They are going to write their own definition of what standards are"); *id.* at H7233 (remarks of Rep. King)("Prosecutors are out of control. They are ruining the civil liberties of people in this country"); *id.* at H7234 (remarks of Rep. Fowler)("Time and time again it has come to my attention that Department of Justice lawyers have conducted themselves in a questionable manner while representing the Federal Government without any penalty or oversight"); *id.* at H7236 (remarks of Rep. Waters)("I know thousands of Mr. McDades who do not have any attorneys, whose grandmothers and mothers come crying to my office for me to help them and I cannot do anything because in my powerful government, prosecutors have run amuck").

[14] *E.g.*, 144 *Cong. Rec.* H7229 (daily ed. Aug. 5, 1998)(remarks of Rep. Murtha)("in addition to trying to intimidate the House of Representatives and ignore the rules of the House, which the public saw immediately, he was reelected three times during this period, when they leaked everything that could possibly be leaked, using those unethical tactics we are talking about during this period of time. Then, after this is all over, they tried to promote the prosecutor to judge"); *id.* at H7233 (remarks of Rep. King)(". . . the judge said it was disgrace. He referred it to the Justice Department to have it investigated. What was done? Nothing. That is what always happens nothing"); *id.* at H7239 (remarks of Rep. Hyde)("I go back to the Iran-Contra days when Elliot Abrams was destroyed by an independent counsel, I thought very unjustly, when Casper Weinberger was indicted three days before an election, and there is just no accountability . . ."); *id.* at H7242 (remarks of Rep. McDade)("Under the current system that we heard described by my colleagues . . . there is a remedy for a citizen, once convicted. They can appeal to another court, a higher court. They can make a recommendation or an argument at OPM, the Office of Professional Responsibility in the Department of Justice, after they have been convicted; lives ruined, bankrupt. If they can prove something, they might get a reversal of their case. Let me be specific. In the case of United States v. Taylor about a year ago, the Department of Justice twisted the testimony of an individual and convicted him on perjurious testimony. If we read the case, we will read that the judge that tried it found the employees of the Department guilty of obstruction of justice. What a charge, corrupting the system that they are supposed to be defending. What did the Office of Professional Responsibility do after the judge made that finding? Mr. Chairman, they gave the people who corrupted that system a 5-day suspension form their

overreaction and the dangers of subjecting federal law enforcement interests to state regulatory authority.[15]

Protective and Corrective Alternatives

The Courts

Although opponents and proponents of the Amendment disagree on its effectiveness, there are, at least in theory, more than a few devices to prevent and correct prosecutorial abuse. The courts are perhaps the most obvious source. They have authority to control criminal trials, to exclude improperly secured evidence, to overturn convictions, to order new trials, and to punish contempts committed before them by fine, suspension from practice before them, removal from a particular case, and/or admonishments and reprimands.

The primary purpose of a federal criminal trial, however, is to determine whether the accused is guilty beyond a reasonable doubt. Buttressed by tradition and the Constitution, the courts have long exercised control over the proceedings to ensure that the determination is made fairly. If a prosecutor's misconduct so infects a trial as to render any verdict uncertain and unfair or otherwise breaches constitutional barriers, the courts will respond.[16]

In the absence of a clear constitutional violation, however, the federal courts, following the lead of the Supreme Court, have shown a growing reluctance to use their supervisory powers to exclude evidence, dismiss indictments, or reverse convictions in order to prevent prosecutorial overreaching.[17] Yet courts and commentators alike have noted a general judicial failure to embrace the alternatives to exclusion, dismissal, and reversal.[18]

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jobs").

[15] *E.g.*, 144 *Cong. Rec.* H7238 (daily ed. Aug. 5, 1998)(remarks of Rep. Bryant)("by and large these are good prosecutors trying to do the right thing in many cases and in very dangerous, very tough situations. What I want to guard against here today is an overreaction to these anecdotal cases"); *id.* at H7244 (remarks of Rep. Barr)("Let us not throw the baby out with the bath water. If there have been abuses, then let us address those particular abuses, but not change and take away the ability of Federal prosecutors to conduct multi-State investigations"); *id.* at H7245 (remarks of Rep. Hutchinson)("We have to be careful not to adopt bad policy because we are sorry for what has happened in the past"); *id.* at H7246 (remarks of Rep. Harman)("If there is a problem with prosecutorial misconduct, it should certainly be addressed. But is it better to address it by requiring federal prosecutors adhere to a single, high standard of conduct, or to 50 different sets of ethics rules? Indeed, some of the state rules may be contrary to the obligations and responsibilities we may require of federal prosecutors").

[16] *United States v. Hastings*, 461 U.S. 499, 505 (1983)("guided by considerations of justice and in the exercise or supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or Congress. The purpose underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct,") (internal quotations and citations omitted); *see also, Twenty-Seventh Annual Review of Criminal Procedure,* "Prosecutorial Misconduct," 86 GEORGETOWN LAW JOURNAL 1677 (1998); Gershman, TRIAL ERROR AND MISCONDUCT (1997).

[17] Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM LAW REVIEW 355, 363 (1996)("In 1983, in *United States v. Hastings*, [461 U.S. 499], the Supreme Court addressed a case in which a Federal Court of Appeals had reversed `gruesome' sexual abuse convictions `to discipline the prosecutor—and warn other prosecutors' about their perceived prosecutorial misconduct. The Supreme Court ordered that the convictions be reinstated, and stated a more restricted view of federal courts' `supervisory power' than was prevalent in many lower courts. The court noted that remedy `more narrowly tailored' than reversal on the merits was available: ethical chastisement and discipline of the offending federal prosecutors").

[18] "We thus find ourselves in a situation with which we are all too familiar: a prosecutor has engaged in misconduct at trial, but no reversible error has been shown," *United States v. Wilson*, 149 F.3d 1726, 1303 (11th Cir.)(Aug. 13, 1998).

Department of Justice

The Department of Justice enjoys even more sweeping authority to discipline its prosecutors, ranging from administrative sanctions to the presentation to a grand jury for prosecution. In addition to supervisory authority over federal prosecutors by the various United States Attorneys' Offices, the Department of Justice maintains an Office of Professional Responsibility (OPR) authorized to receive and review complaints of prosecutorial misconduct, 28 C.F.R. §0.39a. Neither appear to have won universal acclaim as an effective hedge against prosecutorial overreaching.[19]

Civil Remedies

The victims of federal prosecutorial abuse have few civil remedies at their disposal. As a general rule, the federal government enjoys sovereign immunity that prevents it from being sued even for the misconduct of its officers and employees.[20] Personally, federal prosecutors enjoy judicial

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The *Wilson* court listed a series of alternative sanctions ranging from curative jury instructions to contempt citations, fines, reprimands, suspension from the bar of the court, removal of the attorney from the case, and referral to bar disciplinary authorities. It then reiterated an earlier, and apparently unheeded plea, "`We encourage the district courts in this circuit to remain vigilant . . . and consider more [fully these sanctions] in cases of persistent or flagrant misconduct,'" 149 F.3d at 1304, quoting, *United States v. Butera*, 677 F.2d 1376, 1383 (11th Cir. 1982); Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?* 8 ST. THOMAS LAW REVIEW 69, 82 (1995)("In most cases when the propriety of the prosecutor's conduct is called into question, but no remedy is available to the defendant, district judges decline to act as disciplinarians, but instead leave it to others to address the question").

[19] *A Call for a Uniform Standard of Professional Responsibility in the Federal Court System: Is Regulation of Recalcitrant Attorneys at the District Court Level Effective?* 66 UNIVERSITY OF CINCINNATI LAW REVIEW 901, 919 (1998)("The power to the DOJ to regulate misconduct over all of its prosecutors in the ninety-four districts has resulted in marked criticism surrounding the DOJ's ability to effectively regulate its own employees. First, the OPR has been criticized for rarely asserting its jurisdiction over a DOJ attorney; therefore, few investigations of DOJ attorneys actually occur. Second, even when the OPR does assert its jurisdiction, the OPR has been criticized for potential bias because it is regulating one of its own employees. Third, in the unusual instance where the OPR finds a violation by a DOJ attorney, the attorney may avoid scrutiny and discipline by simply leaving the employment of the department. Last, the DOJ rarely issues a public explanation of its internal finding, which precludes public exposure to OPR findings"); Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS LAW REVIEW 69, 84-7 (1995); *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?* 7 GEORGETOWN JOURNAL OF LEGAL ETHICS 1083, 1109-111 (1994).
A number of courts have lamented the failure of various United States Attorneys' Offices to supervise wayward Assistant United States Attorneys or to deal with their misconduct, *e.g.*, *United States v. Kojayan*, 8 F.3d 1315, 1324-325 (9th Cir. 1993)("The overwhelming majority of prosecutors are decent, ethical, honorable lawyers who understand the awesome power they wield, and the responsibility that goes with it. . . . One of the most important responsibilities of the United States Attorney and his senior deputies is ensuring that line attorneys are aware of the special ethical responsibilities of prosecutors, and that they resist the temptation to overreach. . . . What we find most troubling about this case is not the AUSA's initial transgression, but that he seemed to be totally unaware he'd done anything at all wrong, and that there was no one in the United States Attorney's office to set him straight. Nor does the government's considered response, filed after we pointed out the problem, inspire our confidence that this kind of thing won't happen again"); *United States v. Ming He*, 94 F.3d 782, 791 (2d Cir. 1996)("Both cases [*Ming He* and an earlier case *Pinto* in which the Second Circuit warned against a particular form of prosecutorial misconduct] originated in the same district, and though we characterized the prosecutor's conduct in *Pinto* as `unseemly,' the hint to make some sort of change apparently was not acted upon. Instead, the government's conduct in this case, we are told, is not a rare occurrence but `standard practice'"); *United States v. Van Engel*, 15 F.3d 623, 629 (7th Cir. 1993) ("Someone in the Milwaukee U.S. Attorney's office should have known . . . [not to] launch a sting operation [based on meager evidence] against the lawyer of an individual under criminal investigation by the some office").

[20] *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994); *see also*, *United States v. Horn*, 29 F.3d 754, 767 (1st Cir.

immunity from civil liability for their court-related activities as prosecutors and qualified immunity for their activities as investigators.[21]

Congress may abrogate any of these immunities, but it has done so only to a very limited extent. It has, for example, authorized the payment of attorneys' fees and other litigation expenses to "prevailing parties" in a criminal case who are the victims of prosecutorial misconduct that is "vexatious, frivolous, or in bad faith,"[22] and to unindicted subjects of an independent counsel investigation.[23] These authorize relief; they do not speak to either prevention or punishment.

State Bar Authorities

Either the courts or the Department of Justice may refer evidence of a federal prosecutor's ethical violations to the authorities of the bar in the state in which he or she is admitted to practice for disciplinary action. For some time, federal prosecutors have been required to be licensed to practice law in at least one state, district or territory of the United States and consequently to adhere to the ethical standards established for the jurisdictions in which they are licensed. Each jurisdiction has its own means of enforcing adherence to its ethical dictates. Attorneys remain subject to those demands wherever they go, but disciplinary enforcement for out-of-state misconduct is more cumbersome. Complaints are less like to be filed, more costly to investigate, and less convenient to contest. This can be especially telling in the case of federal prosecutors who need not be licensed in the jurisdiction in which they are appointed nor in every jurisdiction in which they perform their duties.

The Amendment seeks to overcome this difficulty by requiring federal prosecutors to follow the ethical standards of any jurisdiction in which they conduct their duties. Critics challenge not the effectiveness of the proposal, but as discussed below at greater length, whether federal law enforcement interests ought to preempt state dictates, at least under some circumstances.

1994)(vacating on sovereign immunity grounds a district court order that the government pay attorneys' fees resulting from a particularly egregious instance of prosecutorial misconduct).

[21] *Kalina v. Fletcher*, 522 U.S. 118 (1997); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

[22] 18 U.S.C. 3006A note, P.L. 105-119, § 617, 111 Stat. 2519 (1997)("During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act [Nov. 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision").

[23] 28 U.S.C. 593(f)("(1) Award of fees.—Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter. The division of the court shall notify the independent counsel who conducted the investigation and Attorney General of any request for attorneys' fees under this subsection. (2) Evaluation of fees.—The division of the court shall direct such independent counsel and the Attorney General to file a written evaluation of any request for attorneys' fees under this subsection, addressing—(A) the sufficiency of the documentation; (B) the need or justification for the underlying item; (C) whether the underlying item would have been incurred but for the requirements of this chapter; and (D) the reasonableness of the amount of money requested").

Objections to the Amendment

The basic objections to section 801 seem to address what it does not do and what it portends rather than what it does. The 1996 hearings on virtually identical language contain perhaps the clearest statement of the Department of Justice's objections to passage of the Amendment—concern over state regulation of federal law enforcement and repudiation of the Department's claim of authority to preempt state pronouncements that conflict with federal law enforcement interests:

H.R. 3386 does, however, have the potential to seriously compromise the public's interest in effective law enforcement. Among other things, the bill could seriously hamstring the Department's ability to conduct undercover investigations. . . .

The primary manner in which H.R. 3386 would affect Federal law enforcement would be by implicitly cutting back on the Attorney General's preemption power. Although the Department requires its attorneys to comply with State ethics rules, the Attorney General currently has the power to preempt those rules when they conflict with Federal law enforcement and interfere with her ability to conduct necessary law enforcement operations. By silently overriding the Attorney General's power in this area, H.R. 3386 could effect at least two important and undesirable changes in current law.

First, it would leave Federal law enforcement vulnerable to hostile State ethics rulings or decisions that interfere with the enforcement of Federal law. Several States, for example, have tried to use "ethics rules" to alter the nature and function of the Federal jury, for example, by dictating to Federal prosecutors what evidence they must present to a *grand jury* or by requiring that prosecutors obtain judicial approval before obtaining subpoenas for evidence from attorneys . . . .

A second and related consequences of H.R. 3386 would be to call into question the Department's regulation on *contacts with represented persons*. Historically, when investigations were carried out exclusively by the police and Federal investigator, ethics rules governing attorneys' contacts with represented persons did not interfere with the legitimate needs of law enforcement; lawyers simply weren't involved. . . . [O]ver the past decades . . . prosecutors have increasingly become more involved in the early stages of criminal investigations.

Generally overwhelmingly, the judicial response has been to recognize that contacts rules do not apply to prosecutors engaged in pre-indictment law enforcement investigations. Nevertheless, prosecutors have increasingly faced contacts-based challenges to law enforcement techniques that were previously unquestioned. Over the past decade these developments have resulted in two highly significant problems for Federal prosecutors.

First, the expansive application of the contacts rule in some jurisdictions has threatened legitimate and essential law enforcement activities. . . .

Second, Federal prosecutors are facing conflicting interpretations of the contacts regulations by various State and Federal authorities. . . .

Ethical Standards for Federal Prosecutors Act of 1996: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong., 2d Sess. 12-3 (1996)(testimony of Seth P. Waxman, Associate Deputy Attorney General)(emphasis added).

No Contact Rules

Rule 4.2 of the American Bar Association's Model Code of Professional Conduct declares that, "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Rule 4.2, or its predecessor under the ABA's Code of Professional Responsibility,[24] has been adopted by each of the States[25] and consequently by the vast majority of federal courts.[26]

Justice Department discomfort with the rule flows not from its explicit demands but from its construction in the face of the shifting realities of contemporary law enforcement practices. These may be best demonstrated by the facts of the cases the Department finds troubling.

Hammad

Conflicts over the reach of the no contact rule came to a head with a case called *United States v. Hammad*.[27] The government began an investigation of Hammad, a New York department store owner, based on the suspicion that he was claiming Medicaid reimbursement for the sale of orthopedic shoes in instances when he had in fact sold ordinary shoes. Hammad retained the services of a lawyer in connection with the matter and the prosecution knew he had done so. The prosecutor armed Goldstein, one of Hammad's shoe suppliers, with a fictitious grand jury subpoena purporting to call Goldstein as a witness in the Hammad investigation. Goldstein then engaged Hammad in incriminating conversations that were surreptitiously tape recorded and videotaped by a Bureau of Alcohol, Tobacco and Firearms agent. After Hammad was indicted for

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[24] ABA Code of Professional Responsibility, DR 7-104(A)("During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client"). Disciplinary Rule 7-104(A) is itself a successor to a provision in the early ABA Canons of Ethics, ABA Canon 9 ("A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law").

[25] State versions of Rule 4.2 are appended.

[26] The local rules of professional conduct for the various federal district courts, which generally adopt the ethical rules of the states in which they are located, are appended. For a general discussion of the no contact controversy see, United States Department of Justice, Attorney General Reno, *Communications with Represented Persons: Supplementary Information*, 59 *Fed.Reg.* 39,928 (1994); Bowman, *A Bludgeon by any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEORGETOWN JOURNAL OF LEGAL ETHICS 665 (1996); Cramton & Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 UNIVERSITY OF PITTSBURGH LAW REVIEW 291 (1992); *Federalizing the No contact Rule: The Authority of the Attorney General*, 33 AMERICAN CRIMINAL LAW REVIEW 189 (1995); Dash, *Justice Department Contacts With Represented Persons: An Alarming Assertion of Power*, 65 JUDICATURE 137 (1994); Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 BOSTON COLLEGE LAW REVIEW 923 (1996); Green, *A Prosecutor's Communication With Defendants: What Are the Limits?* 24 CRIMINAL LAW BULLETIN 283 (1988); Lidge, *Government Civil Investigators and the Ethical Ban on Communicating With Represented Parties*, 67 INDIANA LAW JOURNAL 549 (1992); *Is DoJ Above the Rules? The Department's Bid to Exempt Lawyers From Contact Rules Is Blasted by States' Chief Justices*, 84 AMERICAN BAR ASSOCIATION JOURNAL 26 (November 1997); *The Continuing Conflict Over the Application of Model Rule 4.2 to Federal Attorneys*, 44 AMERICAN UNIVERSITY LAW REVIEW 855 (1995).

[27] *Hammad* involves three opinions, a district court decision, *United States v. Hammad*, 678 F.Supp. 397 (E.D.N.Y. 1987), and two appellate court decisions, *United States v. Hammad*, 846 F.2d 854 (2d Cir. 1988), *revised*, 858 F.2d 834 (2d Cir. 1988).

Medicaid fraud, mail fraud, and obstruction of justice, he moved to suppress the tapes based on an asserted violation of the no contact rule adopted by New York bar authorities.

The resulting district and appellate court opinions brought into focus three of the four points at which interpretation of the no contact rule might be thought to imperil existing or emerging law enforcement practices:

- application during an investigation but before the client has been arrested or charged with the crime under investigation;

- application to not only prosecuting attorneys but also to police, undercover agents, informants and others working with prosecutors; and

- the sanctions are appropriate when a violation occurs.

Left for another day was the question of the rule's application in the case of clients who are also potential witnesses/informants.

The district court concluded that under the circumstances at hand the no contact rule applied even before an arrest or indictment, that the rule applied because Goldstein, who was not a lawyer, had acted as the prosecutor's "alter ego", and that suppression of the evidence was an appropriate sanction for violation of the rule, *United States v. Hammad*, 678 F.Supp. 397 (E.D.N.Y. 1987).

The court of appeals rejected suppression as an appropriate sanction, but agreed that the rule might be violated by informants acting as alter egos of the prosecutor prior to the client's arrest or indictment. In its first, more sweeping statement of violative pre-indictment conduct, it declared that "[c]learlly, clandestine interrogation by an Assistant United States Attorney [of a suspect known to have retained counsel with respect to the matter] would contravene his ethical obligation. On the other hand, the rule is not implicated when an informant comes forth to report conversations of which the prosecutor lacked foreknowledge," *United States v. Hammad*, 846 F.2d 854, 860 (2d Cir. 1988). The revised opinion used a softer and yet less instructive characterization, "the use of informants by government prosecutors in a preindictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the `authorized by law' exception to DR 7-104(A)(1) and therefore will not be subject to sanctions," *United States v. Hammad*, 858 F.2d 834, 838 (2d Cir. 1988).

Hammad is generally compatible with the law in other jurisdictions in its view that suppression is an inappropriate sanction[28] but that a prosecutor's non-lawyer alter egos may trigger application

[28] *United State v. Lowery*, 166 F.3d 1119, 1125 (11th Cir. 1999); *State v. Baker*, 931 S.W.2d 232, 236 (Tenn.Crim.App. 1996); *State v. Decker*, 138 N.H. 432, 438, 641 A.2d 226, 230 (1994); *United States v. Heinz*, 983 F.2d 609, 614 (5th Cir. 1993); *United States v. Ryans*, 903 F.2d 731, 740 (10th Cir. 1990); *Suarez v. State*, 481 So.2d 1201, 1207 (Fla. 1986); *State v. Morgan*, 231 Kan. 472, 479, 646 P.2d 1064, 1070 (1982); *People v. Green*, 405 Mich. 273, 293-94, 274 N.W.2d 448, 454-55 (1979); *but see*, *Henrich v. State*, 666 S.W.2d 185, (Tex.App. 1983)(rule violation constitutes a violation of state law triggering the general suppression statute); *contra*, *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993)(suppression is a permissible but not required remedy for violation of the *rule; United States. v. DeVillio*, 983 F.2d 1185, 1192 (2d Cir. 1993)(same); *State v. Miller*, 600 N.W.2d 457, 467 (1999).
By the same token, most are of the view that the admission of evidence produced as a consequence of a no contact rule violation does not justify dismissing charges or overturning a conviction, *United States v. Lopez*, 4 F.3d 1455, 1463-464 (9th Cir. 1993); *State v. Ford*, 793 P.2d 397, 400 (Utah App. 1990); *Suarez v. State*, 481 So.2d 1201, 1207 (Fla. 1986); *People v. Green*, 405 Mich. 273, 293, 274 N.W.2d 448, 454 (1979); *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir. 1973)

of the rule.[29] Most cases elsewhere both before and after, however, have held that the rule can only be violated after a client has been taken into custody, arrested, indicted or otherwise formally charged, *i.e.*, after there is a specific "matter" with respect to which the client is represented.[30]

The Department of Justice responded to *Hammad* with the so-called Thornburgh memorandum, *printed in*, *In re Doe*, 801 F.Supp. 478, 489 (D.N.M. 1992), a memorandum from Attorney General Thornburgh to all Justice Department litigators announcing that, "it is the Department's position that contact with a represented individual in the course of authorized law enforcement activity does not violate DR 7-104. The Department will resist, on Supremacy Clause grounds, local attempts to curb legitimate federal law enforcement techniques. . . . Accordingly, an attorney employed by the Department, and any individual acting at the direction of that attorney, is authorized to contact or communicate with any individual in the course of an investigation or prosecution unless the contact or communication is prohibited by the Constitution, statute, Executive Order, or applicable federal regulation," *id.* at 493.[31]

Lopez & Ferrara: Client Initiated Contacts

The Department's position was not well received in either the *Lopez*[32] or the *Ferrara*[33] case, both of which grew out of contacts initiated by client/ defendants in custody, rather than by government authorities during a pre-indictment investigation. Lopez retained Tarlow to represent him after he and two co-defendants had been indicted on drug charges. Tarlow, however, indicated that it was his policy not to engage in plea negotiations and that Lopez should retain another attorney if he were interested in plea bargaining. After Twitty, the attorney for one his co-defendants, indicated that the government might consider probation if Lopez and Twitty's client cooperated, Lopez agreed to meet with the prosecutor to discuss a plea bargain. He did so without Tarlow's knowledge, fearing that Tarlow might refuse to represent him at trial if negotiations failed. The prosecutor arranged for Lopez to appear before a magistrate to be advised of his rights and be warned of the dangers of negotiating with the government without having counsel present. Lopez met with federal prosecutors without Tarlow's knowledge, but the plea bargains were never finalized. Tarlow learned of the negotiations from the attorney for the third defendant.

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[29] *E.g.*, *State v. Lang*, 702 A.2d 135, 137 (Vt. 1997); *United States v. Heinz*, 983 F.2d 609, 613 (5th Cir. 1993); *United States v. Ryans*, 903 F.2d 731, 833 (10th Cir. 1990); *United States v. Lemonakis*, 485 F.2d 941, 956 (D.C.Cir. 1973) There is general agreement on a threshold question as well, *i.e.*, the no contact rule is not limited to cases involving civil litigants, but applies with at least equal force in criminal cases, *United States v. Lopez*, 4 F.3d 1455, 1459-460 (9th Cir. 1993); *State v. CIBA-GEIGY Corp.*, 247 N.J.Super. 314, 317, 589 A.2d 180, 181 (1991); *State v. Ford*, 793 P.2d 397, 399-400 (Utah App. 1990); *Suarez v. State*, 481 So.2d 1201, 1205 (Fla. 1985); *United States v. Thomas*, 474 F.2d 110, 111 (10th Cir. 1973); *United States v. Springer*, 460 F.2d 1344, 1354 (7th Cir. 1972).

[30] *E.g.*, *United States v. Balter*, 91 F.3d 427, 436 (3d Cir,. 1996); *State v. Roers*, 520 N.W.2d 752, 758-79 (Minn.App. 1994); *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993); *United States v. Heinz*, 983 F.2d 609, 613 (5th Cir. 1993); *United States v. Ryans*, 903 F.2d 731, 739-40 (10th Cir. 1990); *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C.Cir. 1986); *United States v. Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983); *State v. Irving*, 231 Kan. 258, 262, 644 P.2d 389, 394 (1982); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973).

[31] The foundation for the Thornburgh memorandum had been laid several years earlier in an opinion from the Department's Office of Legal Counsel, *Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations*, 4B OP.OFF.LEG.C. 576 (1980).

[32] *United States v. Lopez*, 765 F.Supp. 1433 (N.D.Cal. 1991), *vac'd and remanded*, 4 F.3d 1455 (9th Cir. 1993); *In re Twitty*, 2 Cal.State Bar Ct.Rprt. 664 (1994)(disciplinary proceedings against defense counsel arising out the *Lopez* case).

[33] *United States v. Ferrara*, 847 F.Supp. 964 (D.D.C. 1993), *aff'd on jurisdictional grounds*, 54 F.3d 825 (D.C.Cir. 1995); *In re Doe*, 801 F.Supp. 478 (D.N.M. 1992)(related case arising out the same facts); *In re Howes*, 123 N.M. 311, 940 P.2d 159 (1997)(disciplinary proceedings the prosecutor in *Ferrara*).

Tarlow withdrew as attorney for Lopez and Lopez moved to dismiss his indictment based on the asserted violation of the California no contact rule that had been adopted for the federal district court by the local rule.

The district court granted the motion to dismiss, *United States v. Lopez*, 765 F.Supp. 1433 (N.D.Cal. 1991). The Court of Appeals agreed that the prosecutor had violated the no contact rule, but found that the district court had exceeded its authority when it dismissed the indictment, *United States v. Lopez*, 4 F.3d 1455, 1463-464 (9th Cir. 1993).

The court rejected the contentions that since Lopez had initiated the contact, he had waived the benefits of the no contact rule, and that he was represented by Tarlow only with respect to any subsequent trial and not with respect to the plea bargain negotiations. The no contact rule imposes a duty upon attorneys that cannot be waived by the contacted party, 4 F.3d at 1462, and as a factual matter Lopez was represented by Tarlow at the time of contact with the prosecutor, 4 F.3d at 1462-463.

The government's argument that the contact come within the rule's "authorized by law" exception because of the Thornburgh memorandum fared no better. Since the general statutory authorities cited by the government did not specifically authorize the contact, they were found insufficient to qualify for the rule's "authorized by law" exception, 4 F.3d at 1461.[34] Nor could the magistrate's approval qualify, since the lower court found that the magistrate had been materially misled, 4 F.3d at 1461-262.

Like *Lopez*, the *Ferrara* case[35] grew out of a contact initiated by a client without his attorney's knowledge. Smith was arrested and charged with murder in the District of Columbia. The public defender assigned to represent him refused to give permission to allow the prosecutor to talk to Smith unless Smith were granted immunity. Smith, nevertheless, frequently contacted and discussed the case with a detective assigned to it who was acting under the prosecutor's instructions. Smith even phoned the detective in the prosecutor's office and raised the matter in a conversation to which the prosecutor was a party. When the public defender learned of the conversations, she sought to have the resulting evidence suppressed. The court denied the motion but the matter was referred to the disciplinary authorities of the New Mexico bar where the prosecutor was admitted. The prosecutor had the case removed to the district court in New Mexico which remanded it back to state authorities.[36] The Department then sued to enjoin further

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[34] The government claimed authority under 28 U.S.C. 509 (vesting the functions of Department of Justice officers, employees and agencies in the Attorney General), 515 (authorizing Department of Justice officials to represent the United States in legal proceedings, 516 (reserving authority to conduct litigation on behalf of the United States to the Department of Justice), 533 (authorizing the Attorney General to appoint officials to conduct the business of the Department of Justice), and 547 (empowering United States Attorneys within their districts to prosecute, defend, and appear on behalf of the United States).
The government did not cite the Thornburgh Memorandum as authorization: "The government, on appeal, has prudently dropped its dependence on the Thornburgh Memorandum in justifying AUSA Lyons' conduct, and has thereby spared us the need of reiterating the district court's trenchant analysis of the inefficacy of the Attorney General's policy statement," 4 F.2d at 1458.

[35] *In re Doe*, 801 F.Supp. 478 (D.N.M. 1992); *United States v. Ferrara*, 847 F.Supp. 964 (D.D.C. 1993), *aff'd on jurisdictional grounds*, 54 F.3d 825 (D.C.Cir. 1995); *In re Howes*, 123 N.M. 311, 940 P.2d 159 (1997)(disciplinary proceedings with an extensive statement of facts).

[36] In doing so the court rejected the interpretation of an earlier court, *Kolibash v. Committee on Legal Ethics*, 872 F.2d 571 (4th Cir. 1989), which had concluded that state disciplinary proceedings were removable to federal court under 28 U.S.C. 1442, *In re Doe*, 801 F.Supp. at 481-84. Like *Lopez*, the court was unpersuaded by the arguments that the Department of Justice's general statutory authority or the Thornburgh memorandum either preempted state no contact rules or constituted qualified for the "authorized by law" exception to the no contact rule, 801 F.Supp. at 484-87. It

inquiry by Ferrara, the Chief Disciplinary Counsel for the New Mexico Supreme Court's Disciplinary Board. The effort failed for want of personal jurisdiction over Ferrara in the District of Columbia where the suit was brought.[37] The New Mexico Supreme Court subsequently found that the prosecutor had violated the no contact rule, publicly censured him, and ordered him to pay $8,663.52 as reimbursement for the cost of the disciplinary proceeding.[38]

O'Keefe: No Contact & Corporate Civil Enforcement

O'Keefe features the no contact rule in a corporate, civil law enforcement context.[39] It originated as a qui tam action brought against a government contractor for overcharging.[40] Following initial discovery, the contractor sought a protective order requiring the government to refrain from contacting the company's employees in violation of the no contact rule. The district court granted the order, denying that contacts authorized by federal regulation then in effect (28 C.F.R. Pt. 77 (1995)) came within the "authorized by law" exception to the no contacts rule.[41] The court of appeals agreed and added that the regulations exceed the Attorney General's authority.[42]

Justice Department Regulations After the Amendment

The Justice Department promulgated revised regulations after the effective date of the Amendment, 28 C.F.R. Pt. 77 (appended), which eliminate the explicit rejection of state no contact rules found in their predecessors. The new regulations, however, appear to require adherence to local no contact rules (and other local state ethical standards) only following a formal judicial appearance or when the government attorney is locally licensed. The regulations repeat the command of the Amendment that government attorneys must follow the local rules "where such attorney engages in that attorney's duties," but only as the phrase is defined in section 77.2 of the regulation, 28 C.F.R. §77.3. "The phrase *where such attorney engages in that attorney's duties* identifies which rules of ethical conduct a Department attorney should comply with, and means . . . (i) if there is a case pending, the rules of ethical conduct adopted by the local federal court or state court before which the case is pending; or (ii) if there is no case pending, the rules of ethical conduct that would be applied by the attorney's state of licensure," 28 C.F.R. §77.2(j). Although the phrase "case pending" is not defined, the term "case" is: "The term *case* means any proceeding over which a state or federal court has jurisdiction, including criminal prosecutions and civil actions. This term also includes grand jury investigations and related

found the claim of prosecutorial immunity equally uncompelling, 801 F.Supp. at 487-89.

[37] Although the appellate court decision was limited to the jurisdictional question, *United States v. Ferrara*, 54 F.3d 825 (D.C.Cir. 1995), the district court in *Ferrara*, jointed *Lopez* and *Doe* in rejection of the Supremacy argument, *United States v. Ferrara*, 847 F.Supp. at 958-70.

[38] The Supremacy and "authorized by law" arguments proved unavailing here too, *In re Howes*, 123 N.M. 311, 318-21, 940 P.2d 159, 166-69 (1997). The severity of the sanctions was driven by the prosecutor's substantial legal experience (*i.e.*, the violation could not be blamed on either ignorance or incompetence), and by his refusal to "accept or even recognize the wrongful nature of his conduct," 123 N.M. at 322, 940 P.2d at 170.
The district court in *Lopez* declined to refer the matter to bar authorities, but Tarlow complained of the prosecutor's conduct to authorities in Arizona where the prosecutor was admitted, 765 F.Supp. at 1462; *In re Twitty*, 2 Cal.State Bar.Ct.Rprt. 664, 672 (1994). There does not appear to have been any reported action on the complaint.

[39] *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 961 F.Supp. 1288 (E.D.Mo. 1997), *aff'd*, 132 F.2d 1252 (8th Cir. 1998).

[40] *United States ex rel. O'Keefe*, 918 F.Supp. 1347 (E.D.Mo. 1996).

[41] 961 F.Supp. at 1293-296. The regulations in question, the so-call Reno regulations, are a revised form of the Thornburgh Memorandum, promulgated by Attorney General Reno, 59 *Fed.Reg.* 39928 (Aug. 4,1994).

[42] 132 F.3d at 1254-257.

proceedings (such as motions to quash grand jury subpoenas and motions to compel testimony), applications for search warrants, and applications for electronic surveillance," 28 C.F.R. §77.2.

This may be insufficient in a state which applies its no contact rule prior to the initiation of formal judicial proceedings, *cf., State v. Miller*, 600 N.W.2d 457, 467 (Minn. 1999) ("Thus we do not perceive that the application of MRPC 4.2 [Minnesota's no contact rule] should be limited, in a criminal context, to contacts with an attorney Adverse counsel's contacts with an attorney's client can be disruptive and deleterious to the attorney's's relationship with a client irrespective of whether the client has been charged with a crime, and the need for the an attorney's counsel in an adverse interview is certainly no less before the client is charged than after").'s client after the client has been charged.

Ethics and the Grand Jury

One criticism of the Amendment is that it fails to overturn *Hammad, Lopez, Ferrara*, and *O'Keefe*. A second area of Department of Justice concern is the impact of ethical standards upon federal grand jury practice, *i.e.*, requiring prosecutors to disclose exculpatory evidence to the grand jury and limiting the circumstances under which a prosecutor may subpoena defense attorneys to appear before the grand jury.[43] It is an area where the ethical precepts are more recently developed, where some courts have been more receptive to the Department's arguments, and where internal Department guidelines seem to have been effective.

Attorney Subpoenas

Rule 3.8(f) of the American Bar Association's Model Rules of Professional Conduct declares that:

> The prosecutor in a criminal case shall . . . (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
>
> (1) the information sought is not protected from disclosure by any applicable privilege;
>
> (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
>
> (3) there is no other feasible alternative to obtain the information.

The standard is of relatively recent origin and has been adopted by only a few jurisdictions.[44] Its application, or the application of an earlier version which required judicial approval for such subpoenas, has been found contrary to federal law by some courts. The rule is a product of

[43] *See generally*, Bowman, *A Bludgeon by any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEORGETOWN JOURNAL OF LEGAL ETHICS 665 (1996) Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINNESOTA LAW REVIEW 917 (1992); Cramton & Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 UNIVERSITY OF PITTSBURGH LAW REVIEW 291 (1992).

[44] The States of Alaska, Colorado, Louisiana, Massachusetts, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee, and Virginia have such provisions (text appended), that have been adopted along with the other state rules by the district courts in Alaska, Colorado, Louisiana, Massachusetts, North Carolina, Oklahoma, Rhode Island. In addition, the provisions of the American Bar Association Code of Professional Conduct have been adopted by the federal district courts in Delaware, Georgia, Montana and West Virginia and for the Northern District of New York, the Western District of North Carolina, and the Middle and Southern Districts of Alabama (text of federal adoption rules are appended).

complaints of grand jury abuse by federal prosecutors that appear to have been addressed by internal Justice Department regulation.[45]

It first appeared as a Massachusetts rule binding on members of the state bar[46] and adopted by the federal district court under local rule.[47] It was challenged immediately, and at first unsuccessfully, as contrary to the Supremacy Clause and the Federal Rules of Criminal Procedure, and as beyond the supervisory power of the district court.[48] When the Pennsylvania Supreme Court adopted the rule,[49] however, the Third Circuit found the Justice Department arguments more persuasive.[50]

The Circuits remain divided on the issue in spite of passage of the Amendment. The Tenth Circuit has concluded that the Amendment obviates any Supremacy Clause problem and confirms that the rule is within the rule-making powers of the state and lower federal courts.[51] The First Circuit believes first that the Amendment does not introduce state ethical rules into federal grand jury practice or any other area of federal activity because it does not constitute a clear, specific congressional mandate and that the rule exceeds the rule-making powers the state and lower federal courts.[52]

Although the Justice Department regulations declare that the Amendment "should not be construed in any way to alter federal substantive, procedural, or evidentiary law," 28 C.F.R. §77.1(b), and that the phrase "state laws and rules and local federal court rules governing attorneys" describing the Amendment's reach "does not include: (1) any . . . rule . . . which does not govern ethical conduct, such as rules of procedure, evidence, or substantive law, whether or

[45] The United States Attorneys' Manual advises federal prosecutors that the head of the Justice Department's Criminal Division must approve attorney subpoenas issued to secure client information and informs them that approval will be based on considerations comparable to those in the ABA rules. In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General of the Criminal Division applies the following principles: The information sought shall not be protected by a valid claim of privilege. All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful. In a criminal investigation or prosecution, there must be reasonable grounds to believe a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the information or prosecution. . . ." UNITED STATES ATTORNEYS' MANUAL §9-13.410 (1997)(a version of the text of §9-13.410 and the accompanying CRIMINAL RESOURCE MANUAL section is appended.

[46] Mass.S.Jud.Ct.R., R. 3:08, PF15 ("It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness").

[47] D.Mass.Local.R., R.5(d)(4)(B).

[48] *United States v. Klubock*, 639 F.Supp. 117 (D.Mass. 1986), *aff'd* 832 F.2d 649 (1st Cir. 1987), *aff'd en banc by an equally divided court*, 832 F.2d 664 (1st Cir. 1987); *Whitehouse v. United States District Court*, 53 F.3d 1349 (1st Cir. 1995); *but see, Stern v. United States District Court*, 214 F.3d 4 (1st Cir. 2000)(*petition for rehearing en banc denied by equally divided court).*

[49] Pa.R.Prof.Conduct, R. 3.10; the rule became applicable in the federal district courts in Pennsylvania by virtue of their general adoption of the Pennsylvania state bar rules, E.D.Pa.Civ.R., R.14; M.D.Pa.R., R.304; W.D.Pa.R., R.22.

[50] *Baylson v. Disciplinary Board*, 975 F.2d 102 (3d Cir. 1992), *aff'g*, 764 F.Supp. 328 (E.D.Pa. 1991).

[51] *United States v. Colorado Supreme Court*, 189 F.3d 1281, 1286-288 (10th Cir. 1999).

[52] *United States v. United States District Court*, 214 F.3d 4, 19-21 (1st Cir. 2000)(*petition for rehearing en banc denied by an equally divided court)*. The rules before the Tenth and First Circuits differed in that the rule in the First Circuit assigned the task of finding the three threshold circumstances required for an attorney-client subpoena to the court while the rule in the Tenth Circuit assigned it to the prosecutor. The First Circuit found the difference critical when distinguishing its opinion from that of an earlier First Circuit panel in *Whitehouse v. United States District Court*, 53 F.3d 1349 (1st Cir. 1995), and from the opinion of the Tenth Circuit, *Stern v. United States District Court*, 214 F.3d at 16-7, 21.

not such rule is included in a code of professional responsibility for attorneys," 28 C.F.R. §77.2(h)(1).

Exculpatory Evidence

The Constitution requires the government in a criminal case to supply the accused with any evidence in its possession material to his guilt, the credibility of witnesses against him, or to the appropriate sentence to be imposed.[53] There is no constitutional requirement, however, that the government disclose such exculpatory evidence to the grand jury that indicts the accused.[54] The states are divided as to whether prosecutors have an ethical obligation to disclose exculpatory evidence to the grand jury.

The ethics of the legal profession have long demanded that attorneys address the courts candidly.[55] In this vein, Rule 3.3(d) of the ABA Model Rules of Professional Conduct notes that, "In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." In its comments upon the special duties of public prosecutors under Rule 3.8, the ABA makes it clear that the obligations of Rule 3.3(d) include the responsibility of prosecutors to disclose exculpatory evidence to the grand jury:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. *See also Rule 3.3(d) governing ex parte proceedings, among which grand jury proceedings are included.* Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4 [*i.e.,* professional misconduct]. ABA Model Code of Professional Conduct, R.3.8, Comment [1] (emphasis added).

A majority of the states have adopted both Rule 3.3(d) and the comments under Rule 3.8.[56] Some have implicitly repudiated the notion that prosecutors have an obligation to disclose exculpatory

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[53] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

[54] *United States v. Williams*, 504 U.S. 36 (1992).

[55] ABA Canons of Ethics 22 ("The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness. . .") (1908); ABA Code of Professional Responsibility DR7-106(B)(1)("In presenting a matter to a tribunal, a lawyer shall disclose: (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel").

[56] Alaska R. of Prof.Conduct, R.3.3(d), R.3.8, Comment; Ariz.R. of Prof.Conduct, ER 3.3(d), R.3.8, Comment; Ark.R. of Prof.Conduct, R. 3.3(d), R.3.8, Comment; Conn.R. of Prof.Conduct, R.3.3(d), R.3.8, Comment; Del.R. of Prof.Conduct, R.3.3(d), R.3.8, Comment; Fla.R. of Prof.Conduct, R. 4-3.3, R. 4-3.8, Comment; Haw. R. of Prof.Conduct, R. 3.3(d), R.3.8, Comment; Ind.R. of Prof.Conduct, R.3.3(d), R.3.8, Comment; Kan.S.Ct.R., R. 226, Model R. of Prof.Conduct, R. 3.3(d), R.3.8, Comment; Ky.S.Ct.R., R. of Prof. Conduct, R.3.3(d), R.3.8, Comment; Md.Lawyers' R. of Prof. Conduct, R. 3.3(d), R.3.8, Comment; Mich.R. of Prof.Conduct, R. 3.3(d), R.3.8, Comment; Miss.R. of Prof. Conduct, R.3.3(d), R.3.8, Comment; Mo.St.Ct.R., R.4-3.3(d), R.3.8, Comment; N.H.R.Prof.Conduct, R.3.3(d), R.3.8, Comment; N.Mex.R.Prof.Conduct, R. 16-303D, R.16-308, Comment; N.D.R.Prof.Conduct, R.3.3(f), R.3.8, Comment; Okla.R.Prof.Conduct, R.3.3(d), R.3.8, Comment; Pa.R.Prof.Conduct, R.3.3(d), R.3.8, Comment; R.I.R.Prof.Conduct, R.3.3(d), R.3.8, Comment; S.C.App.Ct.R., R.407: R.3.3, R 3.8 Comment; Tex.State Bar R., Art.10, §9: Tex.Code of Prof.Conduct, R.3.03(d), R.3.09, Comment; Utah R.Prof.Conduct, R.3.3(d), R.3.8, Comment; Vt.R.Prof.Conduct, R.3.3(d), R.3.8, Comment; W.Va.R.Prof. Conduct, R.3.3(d), R.3.8, Comment; Wis.S.Ct.R.,

evidence to the grand jury by deleting the reference to 3.3(d)(italicized above) from the comment on the special duties of a public prosecutor under Rule 3.8.[57] Some have opted to adopt the Rules but not the Comments.[58] Others continue to use the formulation of the earlier ABA Code of Professional Responsibility under which the issue does not arise.[59] The pattern among the federal courts is similarly diverse, since the vast majority have chosen to impose standards compatible with those of the states in which they sit.

The United States Attorneys' Manual calls for disclosure in an apparently more limited number of instances and alerts its prosecutors to the possible disciplinary consequences within the Justice Department of a failure to comply:

> In *United States v. Williams*, 112 S.Ct. 1735 (1992), the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review. UNITED STATES ATTORNEYS' MANUAL, §9-11.233.

Prosecutors and Undercover Tactics

Rule 4.1(a) of the ABA Model Rules of Professional Conduct declares that "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person;" and Rule 8.4(c) that it "is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Its predecessors, Disciplinary Rules DR7-102(A)(5) and DR1-102(A)(4) of the ABA Model Code of Professional Responsibility are similarly worded. In one form or another, they are in effect in virtually every jurisdiction.[60]

R.20:3.3(d), R.20:3.8, Comment; Wyo.R. of Prof.Conduct, R.3.3(d), R.3.8, Comment. *See also*, D.C.R. of Prof.Conduct, R.3.8: "The prosecutor in a criminal case shall not . . . (g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause."

[57] Ala.R. of Prof.Conduct, R. 3.3, 3.8 Comment; Colo.R. of Prof.Conduct, R. 3.3, R.3.8 Comment; Mass.R. of Prof.Conduct, R. 3.3,.R. 3.8 Comment; Minn.R. of Prof.Conduct, R. 3.3, 3.8 Comment; Nev.S.Ct.R., RR.172, 179; N.J.Rules of Prof.Conduct, RPC 3.3, 3.8 Comment; N.C.R.Prof.Conduct R.3.3, R. 3.8 Comment; S.D.R. of Prof.Conduct, R. 3.3, 3.8 Comment; R. of S.Ct. of Va., Pt.6, §II, RR.R. 3.3, 3.8 Comment.

[58] Idaho R. of Prof. Conduct, R. 3.3, R. 3.8; Ill.R. of Prof.Conduct, R.3.3, R.3.8; La.R. of Prof. Conduct, R.3.3, R.3.8; Me.Code of Prof. Responsibility, R.3.3, R.3.8; Mont.R.Prof.Conduct, R.3.3, R.3.8; Wash.R.Prof.Conduct, R.3.3, R.3.8.

[59] Ga. Code of Prof.Responsibility; Iowa Code of Prof. Responsibility; Neb. Code of Prof.Responsibility; N.Y. R. of Ct. §1200.35; Ohio Code of Prof. Responsibility; Ore. Code of Prof.Responsibility; Tenn.S.Ct.R., R.8.

[60] Ala.R.Prof.Conduct, RR. 4.1(a), 6.4(c); AlaskaR.Prof.Conduct, RR.4.1(a), 8.4(c); Ariz.R Prof.Conduct, ERR 4.1(a), 8.4(c); Ark.R.Prof.Conduct, RR. 4.1(a), 8.4(c); Colo.R. Prof. Conduct, RR. 4.13(a), 8.4(c); Conn.R.Prof.Conduct, RR.4.1(a), 8.4(3); Del.R.Prof. Conduct, RR.4.1(a), 8.4(c); D.C.R.Prof.Conduct, RR.4.3(a), 8.4(c); Fla.R. Prof.Conduct, RR. 4-4.1(a), 4-8.4(c); Ga. Code of Prof.Responsibility, DR7-102(A)(5), DR1-102(A)(4); Haw. R. Prof. Conduct, RR. 4.1(a), 8.4(c); IdahoR.Prof.Conduct, RR. 4.1,(a), 8.4(c); Ill.R. Prof.Conduct, RR.4.1(a), 8.4(c); Ind.R.Prof. Conduct, RR.4.1(a), 8.4(c); Iowa Code of Prof. Responsibility, DR 7-102(A)(5), DR1-102(A)(4); Kan.S.Ct.R., R. 226, Model R. of Prof.Conduct, RR. 4.1(a), 8.4(c); Ky.S.Ct. R.3.130, R. of Prof. Conduct, RR.4.1, 8.3(c); La.R. Prof. Conduct,

The Oregon Supreme Court has concluded that its versions of these two honesty disciplinary rules apply to instances where private attorneys misidentify themselves and make other false statements in the course of an undercover investigation of possible fraud committed against a client, *In re Gatti*, 330 Ore. 517, 8 P.3d 966 (2000). Gatti had claimed the benefit of an "investigation exception" to the prohibitions. The Oregon Attorney General and the United States Attorney for Oregon argued the Court should recognize an exception for government undercover operations. The Court refused to recognize either exception, 330 Ore. at 530-33, 8 P.3d at 974-76. There are few comparable decisions elsewhere.[61]

Who Should Regulate the Ethics of Federal Prosecutors

Questions of undercover investigations, grand jury practice, and client contact aside, the fundamental objection to the McDade-Murtha Amendment is its preservation of the twin notions that federal prosecutors, like other lawyers, should be bound by state regulation of the practice of law and that the rules governing the practice of law in the federal courts should mirror the rules of the states in which they sit, subject to modification by the federal courts in a particular district. It is a theme that runs throughout federal law: compatibility versus uniformity. Should federal law be the same nation wide or should attorneys in any given state be subject to different ethical standards depending upon whether federal or state law governs a particular case.

The alternatives for future Congressional action include provisions that: (1) regulate the practice of law generally (an option with obvious constitutional limitations), (2) regulate the ethical standards of federal attorneys, (3) delegate the authority either to regulate the practice of law or to regulate the practice of law by federal attorneys to (a) the states, (b) the federal courts, (c) the Attorney General, or (d) some administrative rule making body like the Judicial Conference, or (4) address no contact rule, grand jury practice, undercover questions individually.[62]

RR.4.1, 8.4(c); Me.Code of Prof. Responsibility, RR.3.7(b), 3.2(f)(3); Md.Lawyers' R.Prof. Conduct, R. 4.1(a)(1), 8.4(c); Mass.R. Prof. Conduct, RR. 4.1(a), 8.4(c); Mich.R. Prof. Conduct, RR. 4.1, 8.4(c); Minn.R. Prof.Conduct, RR. 4.1, 8.4(c); Miss.R. Prof. Conduct, R4.1(a); Mo.R. Prof. Conduct, RR.4-4.1(a), 4-8.4(c); Mont.R. Prof.Conduct, R.4.1(a), 8.4(c); Neb. Code of Prof.Responsibility, DR 7-102(A)(5), DR1-102(A)(4); Nev.S.Ct.R., RR.181, 203; N.H.R.Prof. Conduct, RR.4.1(a), 8.4(c);N.J.Rules of Prof. Conduct, RRPC 4.1(a)(1), 8.4(c); N.Mex.R. Prof.Conduct, RR.16-401, 16-804[C]; N.Y. R. of Ct. §§1200.33[DR7-102](a)(5), 1200.3[DR1-102](a)(4); N.C.R.Prof.Conduct RR.4.1, 8.4(c); N.D.R.Prof.Conduct, R. 4.1;Ohio Code of Prof. Responsibility, DR7-102(A)(5), DR1-102(A)(4); Okla.R.Prof.Conduct, RR.4.1(a), 8.4(c); Ore.Code of Prof. Responsibility, DR7-102(A)(5), DR1-102(A)(3); Pa.R.Prof.Conduct, RR.4.1(a), 8.4(c); R.I.R.Prof.Conduct, RR.4.1(a), 8.4(c); S.C.App.Ct.R., R.407: RR.4.1(a), 8.4(c); S.D.Cod.Laws 16-18App., R. Prof.Conduct, RR.4.1, 8.4(d); Tenn.S.Ct.R., R.8:DR7-102(A)(5), DR1-102(A)(5); Tex.State Bar R., Art.10, §9: Tex.Code of Prof.Conduct, RR.4.01, 8.04(a)(3); Utah R.Prof. Conduct, RR.4.1(a), 8.4(c); Vt. R.Prof. Conduct, RR4.1, 8.4(c); R. of S.Ct. of Va., Pt.6, §II, RR.4.1(a), 8.4(c); Wash.R.Prof. Conduct, RR.4.1(a), 8.4(c); W.Va.R.Prof.Conduct, RR.4.1(a), 8.4(c); Wis.S.Ct.R., RR.20: 4.1(a), 20:8.4(c); Wyo.R. of Prof. Conduct, RR.4.1(a), 8.4(c).

[61] *Gatti* cites conflicting federal authority for whether private attorneys enjoy an investigation exception, 330 Ore. at 531, 8 P.3d at 975, *citing, "Apple Corps Ltd. v. International Collectors Soc.*, 15 F.Supp.2d 456, 475 (D.N.J. 1998)(lawyers in private practice may use an undercover investigator to detect ongoing violations rather of the law * * *, especially where it would be difficult to discover the violations by other means). *But see Sequa Corp. v. Lititech Inc.*, 807 F.Supp. 653, 663 (D.Colo. 1992)(lawyers in private practice may not use deception to investigate disciplinary violations rather than reporting conduct to authorities)." In a related matter, the jurisdictions to consider the question generally recognize a law enforcement exception for otherwise lawful wiretapping and electronic surveillance, *see, Wiretapping, Tape Recorders & Legal Ethics: Questions Posed by Attorney Involvement in Secretly Recording Conversation*, CRS REP. NO. 98-280 (Mar. 6, 1998).

[62] The relative strengths and weaknesses of these alternatives are beyond the scope of this report, *see generally*, *Uniform Federal Rules of Attorney Conduct: A Flawed Proposal*, 111 HARVARD LAW REVIEW 2063 (1998); *A Call for a Uniform Standard of Professional Responsibility in the Federal Court System: Is Regulation of Recalcitrant Attorneys at the*

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The No Contact Rule

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Alaska: Alaska R. of Prof.Conduct, R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Arizona: Ariz.R. of Prof.Conduct, ER 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Arkansas: Ark.R. of Prof.Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

California: Cal.R. of Prof.Conduct, R. 2-100: (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

(B) For purposes of this rule, a "party": includes: (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit: (1) Communications with a public officer, board, committee, or body; (2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or (3) Communications otherwise authorized by law.

Colorado: Colo.R. of Prof.Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Connecticut: Conn.R. of Prof.Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Delaware: Del.R. of Prof.Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

District of Columbia: D.C.R. of Prof.Conduct, R.4.2: (a) During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the consent of the lawyer representing the other party or is authorized by law to do so.

(b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of the opposing party without obtaining the consent of that party's lawyer. However, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer.

(c) For purposes of this Rule, the term `party' includes any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates.

(d) This Rule does not prohibit communications by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

Florida: Fla.R. of Prof.Conduct, R. 4-4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

Georgia: Ga.State Bar R., R.4-102, R .4.2: (a) A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by constitutional law or statute.

(b) Attorneys for the State and Federal Government shall be subject to this Rule in the same manner as other attorneys in this State.

The maximum penalty for a violation of this Rule is disbarment.

Hawaii: Haw. R. of Prof.Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Idaho: Idaho R. of Prof. Conduct, R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Illinois: Ill.R. of Prof.Conduct, R. 4.2: During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.

Indiana: Ind.R. of Prof.Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Iowa: Iowa Code of Prof. Responsibility, DR 7-104(A)(1): (A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party known to be represented by a lawyer in that matter except with the prior consent of the lawyer representing such other party or as authorized by law.

Kansas: Kan.S.Ct.R., R. 226, Model R. of Prof.Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be

represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Kentucky: Ky.S.Ct.R., R. of Prof. Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Louisiana: La.R. of Prof. Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. A lawyer shall not effect the prohibited communication through a third person, including the lawyer's client.

Maine: Me.Code of Prof. Responsibility, R 3.6(f): During the course of representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Maryland: Md.Lawyers' R. of Prof. Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Massachusetts: Mass.R. of Prof.Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Michigan: Mich.R. of Prof.Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Minnesota: Minn.R. of Prof.Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. A party who is a lawyer may communicate directly with another party unless expressly instructed to avoid communication by the lawyer for the other party, or unless the other party manifests a desire to communicate only through counsel.

Mississippi: Miss.R. of Prof. Conduct, R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Missouri: Mo.St.Ct.R., R.4-4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Montana: Mont.R.Prof.Conduct, R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another

lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Nebraska: Neb.Code of Prof.Responsibility DR 7-104(A)(1): (A) During the course of his or her representation of a client, a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Nevada: Nev.S.Ct.R., R.182: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

New Hampshire: N.H.R.Prof.Conduct, R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

New Jersey: N.J.Rules of Prof.Conduct, RPC 4.2 In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer or is authorized by law to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

New Mexico: N.Mex.R.Prof.Conduct, R. 16-402: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity about the subject matter of the representation even though the corporation, partnership or other entity itself is represented by counsel.

New York: N.Y. R. of Ct. §1200.35 [DR 7-104] : (A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

North Carolina: N.C.R.Prof.Conduct R.4.2: During the representation of a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. It is not a violation of this Rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good faith attempt to resolve the controversy.

North Dakota: N.D.R.Prof.Conduct R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Ohio: Ohio Code of Prof.Responsibility DR 7-104(A)(1): (A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Oklahoma: Okla.R.Prof.Conduct, R.4.2: In representing a client, a lawyer shall not communicate, or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Oregon: Ore. Code of Prof.Responsibility DR 7-104(A)(1): (A) During the course of his or her representation of a client, a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation, or on directly related subjects, with a person he knows to be represented by a lawyer in that subject, or on directly related subjects, unless (a) the lawyer has the prior consent of the lawyer representing such other party; the lawyer is authorized by law to do so; or (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Pennsylvania: Pa.R.Prof.Conduct, R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Rhode Island: R.I.R.Prof.Conduct, R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

South Carolina: S.C.App.Ct.R., R.407: 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

South Dakota: S.D.R.Prof.Conduct, R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Tennessee: Tenn.S.Ct.R., R.8: DR 7-104(A)(1): During the course of a lawyer's representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Texas: Tex.State Bar R., Art.10, §9: Tex.Code of Prof.Conduct, R.4.02: (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person or organization the lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the

subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

Utah: Utah R.Prof.Conduct, R.4.2: (a) General Rule. A lawyer who is representing a client, in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by: (1) constitutional law or statute; (2) decision or a rule of a court of competent jurisdiction; (3) a prior written authorization by a court of competent jurisdiction obtained by the lawyer good faith; or (4) paragraph (b) of this rule.

(b) Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction in the matter, may communciate with a persion known to be represented by a lawyer if:

(1) the communciation is in the course of, and limited to, an investigation of a different matter unrelated to the representation or any ongoing, unlawful conduct; or

(2) the communication is made to protect against imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably relieves may occur, and the communciation is limited to those matters necessary to protect against the imminent risk; or

(3) the communciation is made at the time of the arrest of the represented person and after he or she is advised of his or her rights to remain silent and to counsel and voluntarily and knowingly waives these rights; or

(4) the communication is initiated by the represented person, directly or through an intermediary, if prior to the communciation the represented person has given a written or recorded voluntary and informed wiaver of counsel, including the right to have substitute counsel, for that communciation.

(c) Orgniazaitons as Represented Persons. (1) When the represented "person" is an organization, an individual is "represented" by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communciation, and

(A) with respect to a communcation by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be (i) a current member of the control group of the represented organization; or (ii) a reprsentative fo the organizaiton whose acts or omissions in the matter may be imputed to the organization under applicable law; or (iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.

(2) The term "contorl group" means the following persons: (A) the chief executive officer, chief operating officer, chief financial officer, and chief legal officer of the organization; and (B) to the extent not encompassed by the foregoing, the chair of the organization's governing body, president, treasurer, and secretary, and a vice-president or vice-chair who is in charge of a princial business unit, division, or function (such as sales, adminstration, or finance) or performs a major policy making function for hte organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the detemination of the organization's legal position in the matter.

(3) This rule does not apply to communications with government parties, employees, or officials unless litigation about the subject of the representation is pending or imminent. Communications with eleected officials on policy matters are permissible when litigation is pending or imminent after disclosure of hte representation to the official.

(D) Limitations on Communciations. When communicating with a represented person pursuant to this Rule, no lawyer may (1) inquire aobut privileged communciaitons between the person and counsel or about information regarding litigation strategy or legal arguments of counsel, or seek to induce the person to forego representation or disregard the advice of the person's counsel; or

(2) engage in negotations of a plea agreement, settlement, statutory or nonstauttory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with repsect to the matter in which the person is represented by counsel unless such negotiations are permitted by paragraphs (a)(1), (2) or (3), or (b)(4).

Vermont: Vt.D.R.Prof.Conduct, R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Virginia: Va.,R.Prof.Conduct, R.4.2: In representing a client, alwyer shall not communicate about the subjectj of the representation with a person that the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Washington: Wash.R.Prof.Conduct, R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

West Virginia: W.Va.R.Prof.Conduct, R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Wisconsin: Wis.S.Ct.R., R.4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Wyoming: Wyo.R. of Prof.Conduct, R. 4.2: In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Grand Jury Exculpatory Evidence Rule

Alaska: Alaska R. of Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, including facts are adverse to the lawyer's position.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included."

Arizona: Ariz.R. of Prof.Conduct, ER 3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Arkansas: Ark.R. of Prof.Conduct, R. 3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Connecticut: Conn.R. of Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Delaware: Del.R. of Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included."

District of Columbia: D.C.R. of Prof.Conduct, R.3.8: The prosecutor in a criminal case shall not . . . (g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.

Florida: Fla.R. of Prof.Conduct, R. 4-3.3: In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R. 4-3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 4-3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Indiana: Ind.R. of Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment " A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Kansas: Kan.S.Ct.R., R. 226, Model R. of Prof.Conduct, R. 3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment " A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Kentucky: Ky.S.Ct.R., R. of Prof. Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment " A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Maryland: Md.Lawyers' R. of Prof. Conduct, R. 3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment " A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Michigan: Mich.R. of Prof.Conduct, R. 3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment " A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Mississippi: Miss.R. of Prof. Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment " A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Missouri: Mo.St.Ct.R., R.4-3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment " A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

New Hampshire: N.H.R.Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

New Mexico: N.Mex.R.Prof.Conduct, R. 16-303D.: In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.13-308, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d) [16-303D], governing ex parte proceedings, among which grand jury proceedings are included.

North Dakota: N.D.R.Prof.Conduct, R.3.3(f): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(f), governing ex parte proceedings, among which grand jury proceedings are included.

Oklahoma: Okla.R.Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Pennsylvania: Pa.R.Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment " A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Rhode Island: R.I.R.Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

South Carolina: S.C.App.Ct.R., R.Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

South Dakota: S.D.R.Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Texas: Tex.State Bar R., Art.10, §9: Tex.Code of Prof.Conduct, R.3.03(a): A lawyer shall not knowingly . . . (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision.

R.3.09, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.03(a)(3), governing ex parte proceedings, among which grand jury proceedings are included.

Utah: Utah R.Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Vermont: Vt..R.Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

West Virginia: W.Va.R.Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Wisconsin: Wis.S.Ct.R., R.20:3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.20:3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 20:3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Wyoming: Wyo.R. of Prof.Conduct, R.3.3(d): In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

R.3.8, Comment "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate . . . See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included.

Grand Jury Subpoena Rules

Alaska: Alaska R. of Prof.Conduct, R. 3.8: The prosecutor in a criminal case shall: . . . (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless: (1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; (iii) there is no other feasible alternative to obtain the information; and (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

Colorado: Colo.R. of Prof.Conduct, R. 3.8: The prosecutor in a criminal case shall: . . . (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence abut a past or present client unless: (1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (iii) there is no other feasible alternative to obtain the information.

Georgia: Ga.State Bar R., R.4-102, R .3.8: The prosecutor in a criminal case . . . (f) not supoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the proscutor reasonably believes: (1) the information sought is not protected from disclosure by any applciable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.

Louisiana: La.R. of Prof. Conduct, R. R. 3.8: The prosecutor in a criminal case shall: . . . (f) Not, except in habitual offender proceedings for the purpose of identification only, or in a post conviction proceeding on the issue of competency of counsel raised by his/her former client, subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless: (1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (iii) the purpose of the subpoena is not to harass the attorney or his or her client.

Massachusetts: Mass.R. of Prof.Conduct, R. 3.8: The prosecutor in a criminal case shall . . . (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless: (1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (iii) there is no other feasible alternative to obtain the information; and (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

North Carolina: N.C.R.Prof.Conduct R. 3.8: The prosecutor in a criminal case shall: . . . (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.

Oklahoma: Okla.R.Prof.Conduct, R. 3.8: The prosecutor in a criminal case shall: . . . (g) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past

or present client unless: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information. The lawyer upon whom a subpoena is served shall be afforded a reasonable time to file a motion to quash compulsory process of his/her attendance. Whenever a subpoena is issued for a lawyer who then moves to quash it by invoking attorney/client privilege, the prosecutor may not press further in any proceeding for the subpoenaed lawyer's appearance as a witness until an adversary in camera hearing has resulted in a judicial ruling which resolves all the challenges advanced in the lawyer's motion to quash.

Pennsylvania: Pa.R.Prof.Conduct, R.3.10: A public prosecutor or other government lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney witness.

Rhode Island: R.I.R.Prof.Conduct, R.3.8: The prosecutor in a criminal case shall: . . . (f) not, without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship.

South Carolina: S.C.App.Ct.R., R.Prof.Conduct, R.3.8: The prosecutor in a criminal case shall: . . . (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.

Tennessee: Tenn.S.Ct.R., R.8: DR 7-103(C): It is unprofessional conduct for a prosecutor to subpoena an attorney to the grand jury or to any state or federal administrative body with a similar function without prior judicial approval in circumstances where the prosecutor or such other government attorney seeks to compel the attorney-witness to provide evidence concerning a person who at the time is represented by the attorney-witness.

Vermont: Vt..R.Prof.Conduct, R.3.8: R.3.8:The prosecutor in a criminal case shall: . . . (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.

United States District Court Rules: Standards of Attorney Conduct

Alabama

N.D.Ala.Local R., LR83.1(f)("Each attorney who is admitted to the bar of this court or who appears in this court pursuant to subsection (b) or (c) of this Rule is required to be familiar with, and shall be governed by, the Local Rules of this court and, to the extent not inconsistent with the preceding, the Alabama Rules of Professional Conduct adopted by the Alabama Supreme Court and, to the extent not inconsistent with the preceding, the American Bar Association Model Rules of Professional Conduct, except Rule 3.8(f) thereof [relating to grand jury subpoenas]")

M.D.Ala.Local R., LR83.1(f)("Attorneys admitted to practice before this Court shall adhere to this Court's Local Rules, the Alabama Rules of Professional Conduct, the Alabama Standards for

Imposing Lawyer Discipline, and, to the extent not inconsistent with the preceding, the American Bar Association Model Rules of Professional Conduct")

S.D.Ala.Local R., LR83.5(f)("Any attorney who is admitted to the Bar of this Court or who appears in this court pursuant to subsection (b), (c), (d) or (e) of this rule shall agree to read and abide by the Local Rules of this Court, the ethical limitations and requirements governing the behavior of members of the Alabama State Bar, and, to the extent not inconsistent with the preceding, the American Bar Association Model Rules of Professional Conduct")

Alaska

D.Alaska R., LR 83.1(h)("Every member of the bar of this court and any attorney admitted to practice in this court under D.Ak.LR 83.1(c)-(d) shall be familiar with and comply with the Standards of Professional Responsibility required of the members of the State Bar of Alaska and contained in the Alaska Rules of Professional Conduct and decisions of any court applicable thereto, except insofar as such rules and decisions shall be otherwise inconsistent with federal law . . .")

Arizona

D.Ariz.R. R.1.6(d)("The 'Rules of Professional Conduct,' in the Rules of the Supreme Court of the State of Arizona, shall apply to attorneys admitted or otherwise authorized to practice before the United States District Court for the District of Arizona")

Arkansas

E.D.Ark. & W.D.Ark.R, LR 83.5(e)("All persons enrolled as attorneys in either of these courts shall be subject to the Uniform Federal Rules of Disciplinary Enforcement, which are hereby adopted and included in the Appendix to these rules.")

Model Fed.R. of Disc.Enf., R.IV.B. (". . . The Code of Professional Responsibility or rules of Professional Conduct adopted by this Court is the Code of Professional Responsibility or Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state")

California

C.D.Cal.Local R., Ch.VII. R1.2. ("In order to maintain the effective administration of jsutice and the integrity of hte ocurt, each attorney shall become familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California and the decisions of any curt applicable thereto. These statutes, rules and decisions are hereby adopted as the standards of professional conduct, and any breach or violationt hereof may be the basis for the imposition of discipline. The Model Code of Professional Responsibility of the American Bar Association may be considered guidance.")

E.D.Cal.Local R., Civ.L.R. 83-180(e)("Every member of the Bar of this Court and any attorney permitted to practice in this Court under subsection (b) shall become familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California and the decisions of any Court applicable thereto, which are hereby adopted as standards of professional conduct in this Court. In the absence of an applicable standard therein, the Model Code of Professional Responsibility of the American Bar Association may be considered guidance. No attorney admitted to practice before this Court shall engage in any conduct which

degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice")

E.D.Cal.Local R., L.R.Crim. 50-400(a) ("The general rules ending in 100 to 199. . . are fully applicable inc riminal cases in the absence of a specific criminal rule directly on point")

N.D.Cal.Civ.Local R., CivilL.R. 11-4(a)("Every member of the bar of this Court any any attorney permitted to practice in this Court under Civil L.R. 11 must: (1) Be familar and comply with the standards of professional conduct required of members of the State Bar of California")

N.D.Cal.Crim.Local R., Crim.L.R. 2.1(". . . The provisi0ons of the Civil Local Rules of the Court shall apply to criminal actions and proceedings, except where they may be inconsistent with these criminal local rules, the Federal Rules of Criminal Procedure or provisions of law specifically applicable to criminal cases")

S.D.Cal.Civ.Local R., LR83.4.b. ("Every member of the bar of this court and any attorney permitted to practice in this Court shall become familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and decisions of any court applicable thereto, which are hereby adopted as standards of professional conduct in this court. This specification shall not be interpreted to be exhaustive of the standards of profession conduct. In that connection, the Code of Professional Responsibility of the American Bar Association should be noted. No attorney admitted to practice before this Court shall engage in any conduct which degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice.")

S.D.Cal.Crim.Local Rules, Crim.L.R. 1.1[e.] ("The provosions of the following Civil Local Rules shall apply to criminal actions and proceedings, except where they may be inconsistent with the Federal Rules of Criminal procedure or provisions of law specifically applicable to criminal cases: . . . 21. Rule 83.4. . . .")

Colorado

D.Colo.Local R., LR 83.6 ("The rules of professional conduct, as adopted by the Colorado Supreme Court, are adopted as standards of professional responsibility applicable in this court")

Connecticut

D.Conn.Local R.Civ.P., R.3(a)1.("Other than the specific Rules enumerated in Rule 3(a)2 of these Local Rules [identifying Conn.R.Prof.Conduct 3.6, 3.7(b) relating to], this Court recognizes the authority of the Rule of Professional Conduct as approved by the Judges of the Connecticut Superior Court as in effect on November 1, 1997, as expressing the standards of professional conduct expected of lawyers practicing in the District of Connecticut")

D.Conn.Local.R.Crim.P., R.1(c) ("The following Local Civil Rules shall apply in criminal proceedings: Rule . . . 3 (Discipline of Attorneys) . . . .")

Delaware

D.Del.Local R.Civ.P.&P., R.83.6(d)(2)("Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Model Rules of Professional Conduct of the American Bar Association, subject to such modifications as may be required or permitted by Federal statute, court rule or decision of law, shall constitute misconduct and be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship")

District of Columbia

D.D.C.Local R., LCvR.83.15(a), LCrR.57.26(a) ("Violations of the Rules of Professional Conduct (as adopted by the District of Columbia Court of Appeals except as otherwise provided by specific Rule of this Court) by attorneys subject to these Rules shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship").

Florida

N.D.Fla.Gen.R., R.11.1(G)(1)("Except where an act of Congress, federal rule of procedure, Judicial Conference Resolution or rule of court provides otherwise, the professional conduct of all members of the bar of this district shall be governed by the Rules of Professional Conduct of the Rules Regulating the Florida Bar")

M.D.Fla.R., R.2.02(c)("Any attorney who appears specially in this Court pursuant subsections (a) or (b) of this rule shall be deemed to be familiar with, and shall be governed by, these rules in general, including Rule 2.04 hereof in particular; and shall also be deemed to be familiar with and governed by the Code of Professional Responsibility and other ethical limitations or requirements then governing the professional behavior of members of the Florida Bar")

S.D.Fla.Local R., Gen.R., R.11.1(C)("The standards of professional conduct of members of the Bar of this Court shall include the current Rules Regulating The Florida Bar")

Georgia

N.D.Ga.Civ.Local R., LR 83.1C ("All lawyers practicing before this court shall be governed by and shall comply with the specific rules of practice adopted by this court and, unless otherwise provided, with the Code of Professional Responsibility and the Standards of Conduct contained in the Rules and Regulations of the State Bar of Georgia and with the decisions of this court interpreting these rules and standards")

N.D.Ga.Crim.Local R., LCrR 57.1C ("Refer to LR.83.1C")

M.D.Ga.Local R., LR 83.2.1 (". . . Attorneys practicing before this Court shall be governed by this Court's Local Rules, by the Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, and to the extent not inconsistent with the preceding, the American Bar Association Model Rules of Professional Conduct, except as otherwise provided by specific Rule of this Court")

S.D.Ga.Local R., LR 83.5(d) ("The standards of professional conduct of the members of the bar of this Court shall include the current canons of professional ethics of the American Bar Association. A violation of any of these rules in connection with any matter pending before this Court may constitute a contempt of this Court potentially subjecting such attorney to appropriate disciplinary action")

Hawaii

D.Haw.Gen.R.& Civ.R., LR 83.3("Every member of the bar of this court and any attorney permitted to practice in this court pursuant to LR 83.1(d) shall be governed by and shall observe the standards of professional and ethical conduct required of members of the Hawaii State Bar, except as follows: [Rule 1.6 relating to confidentiality of information and Rule 8.4 relating to misconduct but include the prohibition on dishonesty, fraud, deceit or misrepresentation]")

Idaho

D.Id. Local R., R.83.5(a)("All members of the bar of this court and all attorneys permitted to practice in this court shall familiarize themselves with and comply with the standards of

professional conduct required of members of the Idaho State Bar and decisions of any court applicable thereto which are hereby adopted as standards of professional conduct of this court . . .")

Illinois

N.D.Ill.R.Prof.Conduct, LR.83.50.1. ("LR83.50.1 through LR83.58.9 are the rules of professional conductj for the Northern District of Illinois. The rules have been numbered to permit a ready identificaiton of the comparable rule in the ABA Model Rules. The ABA Model Rules run from 1.1 through 8.5. The local rules are of the fomr LR83.5x.x. where the x.x. part of therule is the same as the comparable ABA Model Rule")(Included are the the candor to the tribunal-grand jury rules and comments of LR83.5*3.3* and LR.83.5*3.8*; the no contact rule of LR83.5*4.2*; and the honesty rules of LR83.5*4.1* and LR83.5*8.4*).

C.D.Ill.Local R., Gen.& Civ.R., LR 83.6(D) ("The Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the Supreme Court of Illinois, as amended from time to time by that court, except as otherwise provided by specific rule of this court after consideration of comments by representatives of bar associations within the state")

S.D.Ill.LocalR., R 83.4(d)(2)(". . . The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Illinois as amended from time to time except as otherwise provided by specific Rule of this Court")

Indiana

N.D.Ind.Local R., L.R.83.5(f)("The Rules of Professional Conduct, as adopted by the Indiana Supreme Court, and the Standards for Professional Conduct, as adopted by the Seventh Circuit, shall provide the standards of conduct for those practicing in this court")

S.D.Ind.Local R., L.R.83.5(f)("The Rules of Professional Conduct, as adopted by the Indiana Supreme Court, shall provide the standards of conduct for those practicing in this Court")

Iowa

N.D.Iowa & S.D.Iowa Local Civ.R. do not appear to specify a standard of conduct to which members of their bars are held other than to observe that, "Any member of the bar of the court may, for good cause shown, and after an opportunity has been given the member to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subject to such other discipline as the court may deem proper," LR 83.2.g.

Kansas

D.Kan.Local R., LR.83.6.1(a)("The Kansas Rules of Professional Conduct as adopted by the Supreme Court of Kansas, and as amended by that court from time to time, except as otherwise provided by a special rule of this court, are adopted by this court as the standards of professional conduct")

Kentucky

E.D.Ky. & W.D.Ky. Jt.Local R., LR 83.3(c) ("If it appears to the Court that an attonrey practicing before the Court has violated the rules of the Kentucky Supreme jCourt governing jprofessional conduct or is guilty of othe rconduct unbecoming an officerj of the Court, any judge may order an attorney to show cause–within a specified time–why the Court should not discipline the attorney . . .")

Louisiana

E.D.La., M.D.La., & W.D.La. Uniform Local R., LR83.2.4E ("This court hereby adopts the Rules of Professional Conduct of the Louisiana State Bar Association, as hereafter may be amended from time to time by the Louisiana Supreme Court, except as otherwise provided by a special rule or general order of a court")

E.D.La., M.D.La., & W.D.La. Uniform Local R., LR83.2.4M ("Except as otherwise provided by a special rule of the court, the Rules of Professional Conduct of the Louisiana State Bar Association promulgated by the Louisiana Supreme Court and in effect on May 15, 1989 are hereby adopted by this court. Subsequently promulgated, or other rules of professional conduct may be adopted by this court by general rule")

E.D.La., M.D.La., & W.D.La. Uniform Local R., LR83.2.4W ("This court hereby adopts the Rules of Professional Conduct of the Louisiana State Bar Association, as hereafter may be amended from time to time by the Louisiana Supreme Court, except as otherwise provided by a special rule of the courts")

Maine

D.Me.R, Civ.R. 83.3(d)(2)(". . . The Code of Professional Responsibility adopted by this Court is the Code of Professional Responsibility adopted by the Supreme Judicial Court of Maine, as amended from time to time by that Court")

Maryland

D.Md.R., R.704 ("This Court shall apply the Rules of Professional Conduct as they have been adopted by the Maryland Court of Appeals")

Massachusetts

D.Mass.Local R., LR. 83.6(4)(B)("Acts or omissions by an attorney admitted to practice before this court pursuant to this Rule 83.6 or appearing and practicing before this court pursuant to Rule 83.7, individually or in concert with any other person or persons, that violate the ethical requirements and rules concerning the practice of law of the Commonwealth of Massachusetts, shall constitute misconduct and be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The ethical requirements and rules concerning the practice of law mean those canons and rules adopted by the Supreme Judicial Court of Massachusetts, embodied in Rules 3:05, 3:07 and 3:08 of said court, as they may be amended from time to time by said court, except as otherwise provided by specific rule of this court after consideration of comments by representatives of bar associations within the Commonwealth")

Michigan

E.D.Mich.Local R., LR83.20(j)("An attorney admitted to the bar of this court or who practices in this court as permitted by this rule is subject to the Rules of Professional Conduct adopted by the Michigan Supreme Court, as amended from time to time, and consents to the jurisdiction of this court and the Michigan Attorney Grievance Commission and the Michigan Attorney Discipline Board for purposes of disciplinary proceedings")

W.D.Mich.Local R. of Pract. & Proc.,LCiv.R. 83(j), LCrR 57(j)("An attorney admitted to the bar of this Court or who practices in this Court as permitted by this Rule is subject to the Rules of Professional Conduct adopted by the Michigan Supreme Court, except those rules a majority of the judges of this Court exclude by administrative order, and consents to the jurisdiction of this

Court and the Michigan Attorney Grievance Commission and Michigan Attorney Discipline Board for purposes of disciplinary proceedings. . .")

Minnesota

D.Minn. Local R., LR 83.6(d)(2)(". . . The *Minnesota Rules of Professional Conduct* adopted by the Supreme Court of Minnesota as amended from time to time by that Court are adopted by this Court except as otherwise provided by specific rules of this Court")

Mississippi

Uniform Local R. for N.D.Miss & S.D.Miss, R.83.5("An attorney who makes an appearance in any case in the district court is bound by the provisions of the Mississippi Rules of Professional Conduct and is subject to discipline for violation thereof.")

Missouri

E.D.Mo.Local R., R.83–12.02 (". . . The Code of Professional Responsibility adopted by this Court is the Code of Professional Responsibility adopted by the Supreme Court of Missouri, as amended from time to time by that Court, except as may otherwise be provided by this Court's Rules of Disciplinary Enforcement")

W.D.Mo.Local Civ.R., R.83.5(c)[2] (". . . The Code of Professional Responsibility adopted by this Court is the Code of Professional Responsibility adopted by the highest court the state in which this Court sits, as amended from time to time by that state court, except as may otherwise be provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state")

Montana

D.Mont.Gen.R., R.110-3 ("The standards of professional conduct of attorneys practicing in this Court shall include The American Bar Association Rules of Professional Conduct")

Nebraska

D.Neb.Local R., NELR 83.5(d)(2)(". . . The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the Supreme Court of Nebraska, as amended from time to time, except as otherwise provided by specific rule of this court after consideration of comments by representatives of bar associations within the state")

Nevada

D.Nev.Local R., L.R.IA 10-7(a)("An attorney admitted to practice pursuant to any of these rules shall adhere to the standards of conduct prescribed by the Model Rules of Professional Conduct as adopted and amended from time to time by the Supreme Court of Nevada, except as such may be modified by this court. Any attorney who violates these standards of conduct may be disbarred, suspended from practice before this court for a definite time, reprimanded or subjected to such other discipline as the court deems proper. This subsection does not restrict the court's contempt power")

New Hampshire

N.H. Local Civ.R., LR 83.5 DR-1 ("The Standards for Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the New Hampshire Supreme Court, as the same may from time to time be amended by that court, and any standards of conduct set forth in these rules . . .")

N.H.Local Crim.R., LCrR 1.1(d)("The following civil/general local rules shall apply in criminal actions: Rules . . . 83.5 . . .")

New Jersey

D.N.J.Local Civ.R., L.Civ.R. 103.1(a) ("The Rules of Professional Conduct of the American Bar Association as revised by the New Jersey Supreme Court shall govern the conduct of the members of the bar admitted to practice in this Court, subject to such modifications as may be required or permitted by Federal statute, regulation, court rule or decision") R., LR-CV 83.9

D.N.J.Local Crim.R., LcrR. ("The following Local Civil Rules are applicable to criminal cases tried in the District of New Jersey . . . L.Civ.R. 103.1 . . . ")

New Mexico

D.N.M.Local R., LR-CV 83.9 ("The Rules of Professional Conduct adopted by the Supreme Court of the State of New Mexico apply except as otherwise provided by local rule or by Court order. Lawyers appearing in this District must comply with `A Lawyer's Creed of Professionalism of the State Bar of New Mexico")

D.N.M.Local R., LR-CR 57.2 ("a. The provisions of D.N.M.LR-Cv . . . .83.9 . . . are herein adopted and incporporated as if fully set forth")

New York

S.D.N.Y. & E.D.N.Y.Local Civ.R., R.1.5(b)("Discipline or othe rrelief . . . may be imposed . . . if any of the following grounds is found . . . (5) In connection with activities in this court, any attorney found to have engaged in conduct violative of the New York State Lawyer's Code of Professional Responsibility as adopted from time to time by the Appellate Divisions of the State of New York, and as interpreted and applied by the United States Supreme Court, the United States Court of Appeals for the Second Circuit, and this court")

S.D.N.Y. & E.D.N.Y.Local Crim.R., R.1.1(b)("In addition to these Local Criminal Rules, Local Civil Rules 1.2 through 1.10 . . . apply in criminal proceedings"

N.D.N.Y. Local R., L.R.83.4(j)("The Code of Professional Responsibility of the American Bar Association shall be enforced in this Court")

W.D.N.Y. Local Civ.P.R., Civ.R.83.3(c)("The Code of Professional Responsibility of the American Bar Association as adopted by the New York State Bar Association shall be enforced in this Court")

W.D.N.Y. Local Crim.P.R., Crim.R.57.4(c)("The Code of Professional Responsibility of the American Bar Association as adopted by the New York State Bar Association shall be enforced in this Court")

North Carolina

E.D.N.C. Local R., Gen.R. 2.10 ("The ethical standard governing the practice of law in this court is the Code of Professional Responsibility of the North Carolina State Bar, Incorporated now in force and as hereafter modified by the Supreme Court of North Carolina, except as may be otherwise provided by special rule of this court . . .")

M.D.N.C. Local R. Civ.P., LR83.11e(b) (". . . The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the Supreme Court of North Carolina, as amended from time to time by that state court, except as may be otherwise provided by special rule of this court")

W.D.N.C. LR.83.1(a) governs admissions to the bar of the Court, but contains no reference to the ethical standards to which members must adhere other than a requirement that members of the North Carolina State bar who seek admission must take an oath in which they swear "that I will demean myself as an attorney and officer of this court in accordance with the Canons of Ethics of the North Carolina State Bar and American Bar Association, and according to law." Other admittees are similarly obligated in all likelihood.

North Dakota

D.N.D. Local R., R.79.1(E)(2)("Where it is shown to the Court that any attorney admitted to practice before this Court may have been convicted of a serious crime . . . or otherwise breached standards of professional conduct, the Court shall enter an order requiring the attorney to appear before the Court and show good cause why that attorney should not be suspended from practice before the Court pending formal commencement of disciplinary proceedings and final disposition of such proceedings . . .")

Ohio

N.D.Ohio Local Civ.R., LR 83.7(a)("Attorneys admitted to practice int his Court shall be bound by the ethical standards of the Code of Professional Responsibility adopted by the Supreme Court of Ohio, so far as they are not inconsistent with federal law")

N.D.Ohio Local Crim.R., LR 57.7(a)("All Attorneys admitted to practice int his Court shall be bound by the ethical standards of the Code of Professional Responsibility adopted by the Supreme Court of Ohio, so far as they are not inconsistent with federal law")

S.D.Ohio Local R., Order 81-1, Model F.R. of Disc.Enf. IVB.(". . . The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state")

Oklahoma

E.D.Okla.Local Civ.R., LR 83.3[K.] ("The Code of Professional Responsibility of the Oklahoma Bar Association, as amended from time to time, is adopted as the standard of conduct for applicants and members of the bar of this Court")

E.D.Okla.Local Crim.R., LR 1.2 ("When appropriate in a criminal context, the Local Rules of Civil Procedure are also deemed applicable to criminal cases")

N.D.Okla.Local Civ.R., LR 83.2[A] ("Attorneys practicing in this court are expected to conduct themselves in accordance with the Oklahoma Rules of Professional Responsibility, as adopted by the Oklahoma Supreme Court, as the standard of conduct of all members of the Oklahoma Bar Association . . .")

N.D.Okla.Local Crim.R., LR 1.2 ("When appropriate in a criminal context, Civil Local Rules . . . 83.2 (Professional Conduct and Courtroom Decorum) . . . are also deemed applicable to criminal cases")

W.D.Okla.Local Civ. R., LCvR 83.6(b)("The Court adopts the Oklahoma Rules of Professional Conduct as adopted and amended from time to time by the Supreme Court of Oklahoma as the standard governing attorney conduct in this Court"

W.D.Okla.Local Crim. R., LCrR 57.2(a)("The provisions of . . . LCvR83.6 Discipline by the Court are applicable to these local criminal rules and are not repeated. . . .")

Oregon

D.Ore. Local R., Civ.R.110-3 ("Every member of the bar of this court and any attorney permitted to practice in this court shall be familiar and comply with the standards of professional conduct required of members of the Oregon State Bar . . .")

Pennsylvania

E.D.Pa. Local R. Civ.R. 83.6, R.IV.B. (". . . The Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state, except that prior court approval as a condition to the issuance of a subpoena addressed to an attorney in any criminal proceeding, including a grand jury, shall not be required. The propriety of such a subpoena may be considered on a motion to quash")

E.D.Pa. Local R. Crim.R. 1.2 ("The following Local Civil Rules shall be fully applicable in all criminal proceedings . . . Rule 83.6. . . .")

M.D.Pa. Local R. 83.23.2 (". . . The Rules of Professional Conduct adopted by this court are: (1) the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, except Rule 3.10, as amended from time to time by that court, unless specifically expected in this court's rules; and (2) the Code of Professional Conduct enacted in the Middle District of Pennsylvania's Civil Justice Reform Act Plan [dealing with civility and decorum]. See Appendix C")

W.D.Pa. Local Civil R. LR83.3.1[B] (". . . The rules of professional conduct adopted by this court are the rules of professional conduct adopted by the Supreme Court of Pennsylvania as amended from time to time by the state court, except that Rule 3.10 has been specifically deleted as a rule of this court, and as otherwise provided by specific order of this court")

W.D.Pa. Local Civil R. LR 1.1 ("These rules shall apply in all proceedings in civil and criminal actions")

Rhode Island

D.R.I. Local R. 4(d)("The Rules of Professional Conduct of the Rhode Island Supreme Court shall be the standard of conduct for all attorneys practicing before this court")

South Carolina

D.S.C.Local R., LCivR. 83.I.08, LCrimR. 57.I.8, FRDE R.IV(B) (" . . .The Code of Professional Responsibility adopted by this Court is the South Carolina Rules of Professional Conduct (Rule 407 of the South Carolina Appellate Court Rules), adopted by the Supreme Court of the State of South Carolina, as amended from time to time, except as otherwise provided by special Rule of this Court.")

South Dakota

D.S.D. Local R. are silent on the question except for the provision that "It shall be the duty of the United States Attorney, under the direction of this Court, to investigate charges against any member of this bar. If, as a result of the investigations, the United States Attorney shall be of the opinion that there has been a breach of professional ethics by a member of this bar, the United States Attorney, as an officer of the Court having special responsibilities for the administration of justice, shall file and prosecute a petition requesting that the alleged offender be subject to appropriate discipline. . . . Such duties may, with the approval of a majority of the judges, be delegated to any member of the bar of this Court approved by them," D.S.D. Local R..83.2(G)(4).

Tennessee

E.D.Tenn. Local R., R. 83.6 ("The Code of Professional Responsibility adopted by the Supreme Court of Tennessee is hereby adopted as rules of professional conduct insofar as they relate to matters within the jurisdiction of this court")

M.D.Tenn. Local R., R. 1(e)(4)("The standard of professional conduct for members of the bar of this Court shall include the current Code of Professional Responsibility of the American Bar Association. . . . This Rule shall not apply to Disciplinary Rule 7-107, which is superseded as a Rule in this District by Rule 3 of these Rules")

W.D.Tenn. Local Civ. R., LR83.1(e)("All attorneys practicing before the United States District Court of the Western District of Tennessee shall comply with the Code of Professional Responsibility as then currently promulgated and amended by the Supreme Court of Tennessee, except that prior court approval as a condition to the issuance of a subpoena addressed to an attorney shall not be required, as specified in Tenn.S.Ct.R.8, DR 7-103(c) and with the Guidelines for Professional Courtesy and Conduct adopted by this court")

Texas

E.D.Tex. Local R., LR AT-2(a)("The standards of professional conduct adopted as part of the Rules Governing the State Bar of Texas shall serve as a guide governing the obligations and responsibilities of all attorneys appearing in this Court. It is recognized, however, that no set of rules may be framed which will particularize all the duties of the attorney in the varying phases of litigation or in all the relations of professional life. Therefore the attorney practicing in this Court should be familiar with the duties and obligations imposed upon members of this Bar by the Texas Disciplinary Rules of Professional Conduct, court decisions, statutes, and the usage customs and practices of this Bar")

N.D.Tex. Local R., L.Civ.R 83.8(e), L.Crim.R. 57.8(e)("The term 'unethical behavior' as used in this rule, includes any conduct that violates any code, rule, or standard of professional conduct or responsibility governing the conduct of attorneys authorized to practice law in the State of Texas")

S.D.Tex. Local R., App.A, R. 1[A] ("Lawyers who practice before this court are required to act as mature and responsible professionals, and the minimum standard of practice shall be the Texas Disciplinary Rules of Professional Conduct.")

Utah

D.Utah R.of Pract., R.83-1.1(h)("All attorneys practicing before this court, whether admitted as members of the bar of this court, admitted pro hac vice, or otherwise as ordered by this court, are governed by and must comply with the rules of practice adopted by this court, and unless otherwise provided by these rules, with the Utah Rules of Professional Conduct, as revised and amended and as interpreted by this court")

Vermont

D.Vt.Local R., R.83.2(d)(4)(B) (". . . The Code of Professional Responsibility or the Rules of Professional Conduct adopted by this court is the Code of Professional Responsibility or the Rules of Professional Conduct adopted by the highest court of the state in which this court sits, as amended from time to time by that state court, except as may otherwise be provided by specific rule of this Court after consideration of comments by representatives of Bar Associations within the state and other interested parties")

Virginia

E.D.Va.Local R. of Pract., R.83.1(I)("The ethical standards relating to the practice of law in this Court shall be the Virginia Code of Professional Responsibility now in force and as hereafter modified or supplemented. However, contrary to Virginia practice, prior Court approval as a condition to the issuance of a subpoena addressed to an attorney in any criminal proceeding, including a grand jury, shall not be required. The propriety of such a subpoena may be considered on a motion to quash")

W.D.Va.R., Standing Orders, Plans; Pl.26, Rule IV. B. (". . .The Code of Professional Responsibility or the Rules of Professional Conduct adopted by this court is the Code of Professional Responsibility or the Rules of Professional Conduct adopted by the highest court the state in which this court sits, as amended from time to time by that state court, except as may otherwise be provided by specific rule of this Court after consideration of comments by representatives of bar associations within the state")

Washington

E.D.Wash. Local R., R 83.3(a)(2)("The members of the bar of this court, and other attorneys appearing in cases in this court whether or not a member of the bar of this court, or of the bar of the state of Washington, shall be governed by and shall observe the Rules of Professional Conduct of the Washington State Bar in effect at the time these rules are adopted, together with any amendments or additions in such Rules. . .").

W.D.Wash. Gen.R., GR 2(e)(1)("The members of the bar of this court shall be governed by and shall observe the Rules of Professional Conduct of the Washington State Bar in effect at the time these rules are adopted, together with any amendments or additions thereto, unless such amendments or additions are specifically disapproved by the court").

West Virginia

N.D.W.Va. Local R., LR Gen P 3.01 ("The Rules of Professional Conduct of the American Bar Association, the Model Federal Rules of Disciplinary Enforcement as adopted by this Court, and the Rules of Professional Conduct as adopted by the Supreme Court of Appeals of West Virginia provide the basic ethical considerations and disciplinary rules for the conduct of attorneys practicing in this Court . . .").

S.D.W.Va. Local R., LR Gen P 3.01 ("The Rules of Professional Conduct of the American Bar Association, the Model Federal Rules of Disciplinary Enforcement as adopted by this Court, and the Rules of Professional Conduct as adopted by the Supreme Court of Appeals of West Virginia provide the basic ethical considerations and disciplinary rules for the conduct of attorneys practicing in this Court . . .").

Wisconsin

E.D.Wis. Local R., R.2, §2.05(a)("The standards of conduct of the members of the bar of this court, of government attorneys, and of nonresident attorneys admitted to practice before this court shall be those prescribed by the Rules of Professional Conduct for Attorneys SCR:20:1.1-8.5, as such may be adopted from time to time by the Supreme Court of Wisconsin and except as such may be modified by this court . . .").

W.D.Wis. Local R., R.1(LR 83.5) The local rules do not adopt rules of professional conduct for members of the bar of the court.

Wyoming

D.Wyo.Local R., Civ.R.83.12.7(b)(". . . The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time-to-time by that state court, except as otherwise provided by specific rule of this Court after consideration of comments by representatives of bar association within the state").

D.Wyo.Local R., Crim.R.1.2 ("When appropriate in a criminal context, the Local Rules of Civil Procedure are also deemed applicable in cirminal cases.")

United States Attorneys' Manual

§9-11.233 Presentation of Exculpatory Evidence

In *United States v. Williams*, 112 S.Ct. 1735 (1992), the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.

§9-13.410 Guidelines for Issuing Grand Jury or Trial Subpoena to Attorneys for Information Relating to the Representation of Clients

A. Clearance with the Criminal Division. Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the attorney's representation of a client, the Department exercises close control over such subpoenas. All such subpoenas (for both criminal and civil matters) must first be authorized by the Assistant Attorney General for the Criminal Division before they may issue.

B. Preliminary Steps. When determining whether to issue a subpoena to an attorney for information relating to the attorney's representation of a client, the Assistant United States Attorney must strike a balance between an individual's right to the effective assistance of counsel and the public's interest in the fair administration of justice and effective law enforcement. To that end, all reasonable attempts shall be made to obtain the information form alternative sources before issuing the subpoena to the attorney, unless such efforts would compromise the investigation or case. These attempts shall include reasonable efforts to first obtain the information voluntarily from the attorney, unless such efforts would compromise the investigation or case, or would impair the ability to subpoena the information from the attorney in the event that the attempt to obtain the information voluntarily proves unsuccessful.

C. Evaluation of the Request. In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General of the Criminal Division applies the following principles:

- The information sought shall not be protected by a valid claim of privilege.

- All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.
- In a criminal investigation or prosecution, there must be reasonable grounds to believe a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the information or prosecution. The subpoena must not beused to obtain peripheral or speculative information.
- In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation.
- The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client
- The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

See also the Criminal Resource Manual at 263.

D. Submitting the Request. . . .

E. No Rights Created by Guidelines. These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative prerogatives of the Department of Justice.

[Department of Justice] Criminal Resource Manual 263

Common Factual Settings Involving Subpoenas to Attorneys

The Department's policy applies whenever a subpoena will issue for information relating to representation of a client. Accordingly, authorization must be obtained even for the "friendly subpoena" where the attorney witness is willing to provide the information, but requests the formality of a subpoena.

Conversely, if the attorney is willing to voluntarily appear and no subpoena is necessary, there is no need to consult the Department.

Departmental authorization is not required in every instance in which a subpoena involves an attorney. There are several common situations in which it is not necessary to seek authorization before issuing a subpoena:

> (1) A subpoena directed to a bank for the records of an attorney's trust account does not require authorization because the subpoena is not directed to the attorney, and the information maintained at the bank is not a privileged attorney-client communication.
>
> (2) While a subpoena which seeks client billing records requires authorization, a subpoena which seeks internal law office business documents (pay records of law office employees, law firm tax returns, etc.) does not, because it relates to the day-to-day business operations of the law firm, and not to the representation of a client.
>
> (3) A subpoena seeking information regarding the attorney's personal activities, such as his/her purchase of real estate in a personal, and not representative capacity, does not require authorization.

(4) A subpoena which seeks corporate business information, and which is directed to an attorney who serves as a corporate officer, does not require authorization. To make clear that the attorney is being subpoenaed in his/her capacity as a corporate officer, and that no attorney-client information is being sought, the subpoena should be addressed to "John [Jane] Doe, in his/her capacity as secretary of the XYZ Corporation."

28 C.F.R. Pt. 77

§77.1 Purpose and authority.

(a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to implement 28 U.S.C. 530B and to provide guidance to attorneys concerning the requirements imposed on Department attorneys by 28 U.S.C. 530B.

(b) Section 530B requires Department attorneys to comply with state and local federal court rules of professional responsibility, but should not be construed in any way to alter federal substantive, procedural, or evidentiary law or to interfere with the Attorney General's authority to send Department attorneys into any court in the United States.

(c) Section 530B imposes on Department attorneys the same rules of professional responsibility that apply to non-Department attorneys, but should not be construed to impose greater burdens on Department attorneys than those on non-Department attorneys or to alter rules of professional responsibility that expressly exempt government attorneys from their application.

(d) The regulations set forth in this part seek to provide guidance to Department attorneys in determining the rules with which such attorneys should comply.

§ 77.2 Definitions.

As used in this part, the following terms shall have the following meanings, unless the context indicates otherwise:

(a) The phrase *attorney for the government* means the Attorney General; the Deputy Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, and Tax Division; the Chief Counsel for the DEA and any attorney employed in that office; the General Counsel of the FBI and any attorney employed in that office or in the (Office of General Counsel) of the FBI; any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515; any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; and any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States. The phrase *attorney for the government* also includes any independent counsel, or employee of such counsel, appointed under chapter 40 of title 28, United States Code. The phrase *attorney for the government* does not include attorneys employed as investigators or other law enforcement agents by the Department of Justice who are not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.

(b) The term *case* means any proceeding over which a state or federal court has jurisdiction, including criminal prosecutions and civil actions. This term also includes grand jury investigations and related proceedings (such as motions to quash grand jury subpoenas and

motions to compel testimony), applications for search warrants, and applications for electronic surveillance.

(c) The phrase *civil law enforcement investigation* means an investigation of possible civil violations of, or claims under, federal law that may form the basis for a civil law enforcement proceeding.

(d) The phrase *civil law enforcement proceeding* means a civil action or proceeding before any court or other tribunal brought by the Department of Justice under the authority of the United States to enforce federal laws or regulations, and includes proceedings related to the enforcement of an administrative subpoena or summons or civil investigative demand.

(e) The terms *conduct* and *activity* means any act performed by a Department attorney that implicates a rule governing attorneys, as that term is defined in paragraph (h) of this section.

(f) The phrase *Department attorney[s]* is synonymous with the phrase "attorney[s] for the government" as defined in this section.

(g) The term *person* means any individual or organization.

(h) The phrase *state laws and rules and local federal court rules governing attorneys* means rules enacted or adopted by any State or Territory of the United States or the District of Columbia or by any federal court, that prescribe ethical conduct for attorneys *and* that would subject an attorney, whether or not a Department attorney, to professional discipline, such as a code of professional responsibility. The phrase does not include:

(1) Any statute, rule, or regulation which does not govern ethical conduct, such as rules of procedure, evidence, or substantive law, whether or not such rule is included in a code of professional responsibility for attorneys;

(2) Any statute, rule, or regulation that purports to govern the conduct of any class of persons other than attorneys, such as rules that govern the conduct of all litigants and judges, as well as attorneys; or

(3) A statute, rule, or regulation requiring licensure or membership in a particular state bar.

(i) The phrase *state of licensure* means the District of Columbia or any State or Territory where a Department attorney is duly licensed and authorized to practice as an attorney. This term shall be construed in the same manner as it has been construed pursuant to the provisions of Pub.L. 96-132, 93 Stat. 1040, 1044 (1979), and Sec. 102 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agency Appropriations Act, 1999, Pub.L. 105-277.

(j)(1) The phrase *where such attorney engages in that attorney's duties* identifies which rules of ethical conduct a Department attorney should comply with, and means, with respect to particular conduct:

(i) If there is a case pending, the rules of ethical conduct adopted by the local federal court or state court before which the case is pending; or

(ii) If there is no case pending, the rules of ethical conduct that would be applied by the attorney's state of licensure.

(2) A Department attorney does not "engage[ ] in that attorney's duties" in any states in which the attorney's conduct is not substantial and continuous, such as a jurisdiction in which an attorney takes a deposition (related to a case pending in another court) or directs a contact to be made by an investigative agent, or responds to an inquiry by an investigative agent. Nor does the phrase

include any jurisdiction that would not ordinarily apply its rules of ethical conduct to particular conduct or activity by the attorney.

(k) The phrase *to the same extent and in the same manner as other attorneys* means that Department attorneys shall only be subject to laws and rules of ethical conduct governing attorneys in the same manner as such rules apply to non-Department attorneys. The phrase does not, however, purport to eliminate or otherwise alter state or federal laws and rules and federal court rules that expressly exclude some or all government attorneys from particular limitations or prohibitions.

§77.3 Application of 28 U.S.C. 530B.

In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in 77.2 of this part.

§77.4 Guidance.

(a) *Rules of the court before which a case is pending.* A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.

(b) *Inconsistent rules where there is a pending case.* (1) If the rule of the attorney's state of licensure would prohibit an action that is permissible under the rules of the court before which a case is pending, the attorney should consider:

(i) Whether the attorney's state of licensure would apply the rule of the court before which the case is pending, rather than the rule of the state of licensure;

(ii) Whether the local federal court rule preempts contrary state rules; and

iii) Whether application of traditional choice-of-law principles directs the attorney to comply with a particular rule.

(2) In the process of considering the factors described in paragraph (b)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(c) *Choice of rules where there is no pending case.* (1) Where no case is pending, the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought.

(2) In the process of considering the factors described in paragraph (c)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(d) *Rules that impose an irreconcilable conflict.* If, after consideration of traditional choice-of-law principles, the attorney concludes that multiple rules may apply to particular conduct and that such rules impose irreconcilable obligations on the attorney, the attorney should consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(e) *Supervisory attorneys.* Each attorney, including supervisory attorneys, must assess his or her ethical obligations with respect to particular conduct. Department attorneys shall not direct any

attorney to engage in conduct that violates section 530B. A supervisor or other Department attorney who, in good faith, gives advice or guidance to another Department attorney about the o

other attorney's ethical obligations should not be deemed to violate these rules.

(f) *Investigative Agents*. A Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under section 530B. A Department attorney who in good faith provides legal advice or guidance upon request to an investigative agent should not be deemed to violate these rules.

§77.5 No private remedies.

The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, including criminal defendants, targets or subjects of criminal investigations, witnesses in criminal or civil cases (including civil law enforcement proceedings), or plaintiffs or defendants in civil investigations or litigation; or any other person, whether or not a party to litigation with the United States, or their counsel; and shall not be a basis for dismissing criminal or civil charges or proceedings or for excluding relevant evidence in any judicial or administrative proceeding. Nor are any limitations placed on otherwise lawful litigative prerogatives of the Department of Justice as a result of this part.

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